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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 136.

THE F. O. MATTHIESSEN AND WIECHERS SUGAR REFINING COMPANY, APPELLANT,

vs.

THE STEAMSHIP "LUDVIG HOLBERG," &c., CHRISTOPHER KAHRS ET AL., CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 25, 1894.

(14,591.)

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1 United States Circuit Court, Southern District of New York.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY, Libellant & Appellant,
vs.
THE STEAMSHIP "LUDVIG HOLBERG," HER ENGINES, &C.; CHRISTOPHER KAHRS *et al.*, Claimants & Appellees.

Bill of Exceptions.

The libel in this case was filed in the district court of the United States for the southern district of New York on the fourth day of June, 1887, and was as follows:

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of the F. O. Matthiessen & Wiechers Sugar Refining Company against the Norwegian steamship "Ludvig Holberg" and the steam-tug "Leonard Richards," in a cause of collision civil and maritime, articulately propounds and alleges as follows:

First. Your libellants are a manufacturing corporation duly organized and incorporated according to law and having its office for the transaction of its business at No. 106 Wall street, in the city of New York.

Second. Under and in pursuance of a certain written charter-party, executed in London, England, on or about the second day of November, 1886, between certain persons transacting business as merchants in Java under the firm name and style of Wellenstein, Krause & Co. and Messrs. Troop & Son, owners of the bark
2 "Quickstep," the said Messrs. Wellenstein, Krause & Co. shipped on board the said bark "Quickstep," A. J. Morrison, master, at the port of Cheribon, on or about the 24th day of December, 1886, one thousand one hundred and forty baskets of sugar, weighing, net, five thousand and fifty-seven and thirty-two one-hundredth- piculs, and on or about the 27th day of December, 1886, the said firm shipped on the said bark, at the said port, 718 baskets of sugar, weighing, net, three thousand one hundred and twenty-four and twenty-nine over one hundred piculs, and on or about the 3d day of January, 1887, the said firm shipped on board the said bark, at the port of Fayal, six hundred and seventy-two baskets of sugar, weighing, net, three thousand one hundred and seventy-two eighteen one-hundredths piculs, and on or about the 13th day of January, 1887, the said firm shipped on board the said bark, at the port of Pekalongan, one thousand one hundred and fifty-one baskets of sugar, weighing, net, five thousand five hundred and nine and thirty-two one-hundredth- piculs.

Third. The aforesaid shipments of sugar were, at the time of shipment, owned by the libellant and were, by agreement with Morri-

son, master of the said bark "Quickstep," to be conveyed on board said bark Quickstep to the port of New York, and there delivered to the said shippers' order or assigns in consideration of freight stipulated to be paid thereon, and prior to the collision hereinafter mentioned the said shippers sold the said shipments to your libellant, who is owner of the same, and duly endorsed, assigned, and transferred to them the several bills of lading issued therefor by the said master.

Fourth. That thereafter the said bark "Quickstep" set sail on her said voyage and arrived off Sandy Hook, New York, on the 28th day of May, 1887, having the said cargo on board.

3 Fifth. Upon information and belief your libellant avers that thereupon the tug "Leonard Richards" took the said bark "Quickstep" in tow in pursuance of an agreement theretofore made between the master of said tug and the master of said bark to tow the said bark safely to an anchorage in New York bay; that the said tug towed the said bark at the end of the hawser over the bar and up through the swash channel, during which time the sails of the said bark were clewed up and furled, so that she was without motive power of her own and dependent upon the said tug for propulsion; that the wind was then light and the weather moderately clear and the tide about half flood, and after getting into the main ship channel and while approaching towards the west bank the steamship "Ludvig Holberg" was made out about half a point on the port bow of said tug and bark nearly end on, but having the said tug and bark on her starboard bow; that thereupon the tug blew a signal of two whistles, to which the steamship made no reply, and the tugboat thereupon blew a single whistle, which was answered by the steamship with one whistle. After the said steamship gave a further signal of two whistles, which the tugboat answered with two whistles, *and* the steamship, coming on at a high and excessive rate of speed, struck the said bark a violent blow on the port quarter, cutting her down below the water's edge and injuring her so that she sunk in deep water and became, with the whole of her said cargo, a total loss except some four hundred baskets thereof, saved at a considerable expense in a badly damaged condition.

Sixth. Your libellants are without fault in the premises, and the said collision was caused solely by the negligence and default of those in charge of said steamship and said steam-tug in the following particulars, among others, in that the said tug, being on the starboard

4 bow of the said steamship, first blew a signal of two whistles; in that the said tug and the said steamship, having thereafter exchanged signals of one blast of their whistles, did not each port their respective helms so as to pass each other's port side; in that the said steamship, having given and received the signal of one blast, did thereafter give another signal of two blasts, signifying an intention to cross on the other side at a time when there was not sufficient room to perform said manœuvre in safety; in that the said tug, having given and received the signal of one blast, subsequently accepted and returned the steamship's signal of two blasts at a time

when there was not sufficient opportunity to act in accordance therewith in safety; in that the said tug and the said steamship were proceeding at too high and excessive a rate of speed; in that the said tug and steamship did not each shift their helms in time to pass each other in safety; in that the said steamship and said steam-tug did not sooner stop and reverse their engines; in that the said steam-tug and steamship unnecessarily and without sufficient cause or excuse therefor changed their courses by approaching each other; in that the said steamship, having said steam-tug on her starboard bow, did not keep out of the way of the said steam-tug and bark; in that the said steamship and steam-tug gave contradictory and confusing signals to each other; in that the said steamship and steam-tug were negligent and in default in several other respects which will be pointed out by the libellant on the trial of this action.

Seventh. By reason of the aforesaid collision and of the negligence and default of those in charge of the said steamship and steam-tug the said cargo of sugar, except the aforesaid four hundred baskets, have become totally lost, and your libellants are damaged to the extent of the value thereof and of the expense and damage, to wit, the sum of sixty ($60,000) thousand dollars, no part of which damage has been made good to your libellants.

Eighth. The said steamship and the said steam-tug are now within this port and are about to proceed to sea.

Ninth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore your libellants pray that process in due form of law, according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said steamship and the said steam-tug, their engines, tackle, apparel, and furniture, and that all persons claiming any right, title, or interest therein may be cited to appear and answer under oath all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payment of the damages due as aforesaid, with interest and costs, and that the said vessels, etc., may be condemned and sold to pay the same, and that the libellants may have such other and further and different relief in the premises as in law and justice they may be entitled to receive.

F. O. MATTHIESSEN & WIECHERS
SUGAR REFINING COMPANY.
G. JURGENSEN, *Sec'y and Treasurer.*

Sworn to and subscribed before me, in the city of New York, on this 4th day of June, A. D. 1887.

LOUIS KLEIN,
Notary Public, Kings County.

Certif. filed in N. Y. Co.

SIDNEY CHUBB,
Proctor for Libellants, 50 Wall Street, New York, N. Y.

6 The claimants filed their answer to said libel on the 4th day of August, 1887, as follows:

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

Christopher Kahrs, L. D. Kahrs, Christian Kahrs, P. Jebsen, T. C. Krohn, John Lund, Jens Elerhuesen, L. Arnesen, G. Greig, and P. G. Halvorsen, of Bergen, Norway, owners and claimants of the steamship Ludvig Holberg, her engines, etc., answer the libel and complaint of the F. O. Matthiessen & Wiechers Sugar Refining Company against said steamship in a cause of collision, civil and maritime, as follows:

First. These claimants admit the first article of the libel.

Second. These claimants have no knowledge of the truth of any of the allegations contained in the second, third, and fourth articles of said libel, and therefore leave the libellant to its proof in that regard.

Third. These claimants admit that the bark "Quickstep" was taken in tow by the tugboat "Leonard Richards," in pursuance of an agreement therefor, and that the said bark was towed astern upon the end of a hawser, and that the wind was light, and that the bark "Quickstep" and the steamship "Ludvig Holberg" came into collision, the said bark being struck on the port quarter, injuring her so that thereafter she sank; and, further answering, these claimants deny each and every other averment of the fifth article of the libel except as hereinbefore or hereinafter admitted.

Fourth. These claimants deny each and all charges of fault and negligence on the part of their said steamship "Ludvig Holberg," as set forth in the sixth article of said libel.

6a Fifth. These claimants have no knowledge of the amount of the loss to the libellants or of the value of the cargo upon said bark, and therefore leave the libellant to its proof in that regard.

Sixth. These claimants admit that their said steamship "Ludvig Holberg" is within this port, but as to the steam-tug "Leonard Richards" they have no knowledge.

Seventh. These claimants admit the jurisdiction of this honorable court, but deny the other allegations of the ninth article of the libel.

Eighth. Further answering, these claimants allege that they are the owners of the steamship "Ludvig Holberg," which is an iron Norwegian screw steamship of 687.44 tons register, hailing and registered at the port of Bergen, Norway. On the afternoon of May 25th, 1887, at about 3.05 p. m., said steamship, with licensed pilot on board, who had charge of her navigation, left her pier in the East river and proceeded down New York bay upon her voyage in ballast to Baracoa for fruit. Said steamship was tight, staunch, and strong, and properly manned and officered, having a competent and long experienced master and officers and a full complement of men. Both master and pilot were on the bridge, and immediately astern of the bridge, and adjoining it, was the

wheelsman steering the vessel as directed by the pilot. As said steamship proceeded down the bay and reached a point in the channel between the quarantine station at Clifton and Fort Wadsworth, on Staten island, and before reaching the narrows, the weather became foggy, whereupon the engines of the steamship were reduced to "half speed," and the first officer and the second officer were stationed in the eyes of the ship at the bow as lookouts. As the fog became more dense, and a few minutes after the half-speed signal to the engine, the master signaled to the engineer "slow,"
7 whereupon the engines were reduced to a speed of three and a half to four knots per hour, revolving from 20 to 25 revolutions a minute, and the fog whistle on said steamship was being steadily sounded. While said steamship was cautiously proceeding down the channel, keeping upon the starboard side, as near to the channel buoys as she could safely go, upon a compass course of south half west, and at a speed of three and a half to four knots an hour, the fog being still dense, a whistle was heard nearly ahead and slightly on the starboard bow, and directly afterwards a tugboat was seen close to the "Ludvig Holberg" between two and three hundred feet off and bearing between half a point and a point on steamer's starboard bow. The tugboat immediately blew two blasts of her whistle, which the Holberg at once answered with two assenting blasts and starboarded her helm about a point. The tugboat came on at rapid speed, heading to pass the steamship starboard to starboard, and when almost abreast of the Holberg's bows the lookouts and officers of the Holberg first saw in the dense fog the loom or shadow of a bark in tow (which was learned afterward to be the Quickstep) apparently bearing two points on the Holberg's port bow and about three hundred feet distant. The steamship's helm was instantly hard-ported and the engines set "stop, full speed astern," and one short blast of the steamship's whistle given, followed by repeated hails to the tugboat to cast off the hawser. The steamship was beginning to swing under the port helm as her starboard bow struck the towing hawser, which, before it parted, canted the steamship somewhat to port, and, although the engines were backing at full speed and the headway of the steamer checked, the bark came on at full speed with the flood tide, which brought the bark's port quarter abaft the mizzen rigging in contact with the stem of the steamer at a
8 very acute angle, with such force as to cut into the planking of the bark, causing her afterwards to sink. The officers and pilot of said steamship at the time they first saw the said tugboat were not informed by signal that she had any vessel in tow, although by the inspector's rules three blasts of the whistle are required to be blown in such case, and owing to the density of the fog, although they were vigilantly looking ahead, they could not see any vessel before they saw the bark, and in starboarding their helm were obeying the signal which the said tugboat had given and which the Ludvig Holberg had assented to in ignorance of any danger from a vessel astern on a hawser. When the bark was first seen the steamship did everything in her power, by porting her

helm, stopping and reversing her engines, to avert the collision, and her officers were at all times watchful and vigilant and looking out for approaching vessels. Said steamship was provided with machinery and engines of approved construction, capable of being reversed with great promptitude, and was also furnished with a repeating Chadburn telegraph, communicating from the bridge to the engine-room, of the latest design, for instantaneous transmission of orders from the bridge and return signals from the engineer.

Ninth. Said collision and damage was not due to any negligence on the part of the officers or pilot of said steamship, but was due to those in charge of the bark Quickstep in the following particulars: 1. Towing on too long a hawser in dense fog. 2. Too great speed in fog, and in particular not stopping or slowing as soon as there was risk of collision. 3. Not sounding a fog-horn upon the bark, by which her presence could have been indicated to approaching vessels. 4. Not keeping after the tugboat. 5. Having no proper lookout. 6. Not directing the course of the tugboat by the
9 pilot upon the bark. 7. Not keeping on the right side of the channel as required by law. 8. Making five changes of course. 9. Not promptly casting off the hawser before the collision, and in other faults which these claimants will show upon the trial of this action. These claimants also charge that the said collision was in part due to the negligence of those in charge of the tugboat Leonard Richards in going at too great a rate of speed in fog, especially after there was risk of collision; not blowing proper signals, and in not keeping at the right side of the channel, and in neglecting to observe the course of the bark, and in not casting off the hawser as soon as it appeared that the bark was intending to pass the steamship port to port, and in other faults which will appear on the trial of this cause.

Tenth. All and singular the foregoing are true.

Wherefore claimants pray that the libel herein as to the steamship Ludvig Holberg may be dismissed with costs.

CHRISTOPHER KAHRS,
By FUNCH, EDYE & CO., *Agents.*

CITY AND COUNTY OF NEW YORK, *ss:*

Henry W. O. Edye, having been duly sworn, says he is a member of the firm of Funch, Edye & Co., of the city of New York, who are the agents of the claimants herein; that none of the claimants are within this district or within the United States, but are in Norway as deponent is informed and believes. Deponent has read the foregoing answer subscribed by him and the same is true to the best of his knowledge, information, and belief.

HENRY W. O. EDYE.

WING, SHOUDY & PUTNAM,
Proctors for Claimants of S. S. Ludvig Holberg.

Sworn to before me this 3d day of Aug., 1887.

JOHN C. H. I. KRAMER,
Notary Public, Kings and N. Y. Counties.

10 The case was tried in the district court and a final decree entered therein on the 7th day of December, 1888, as follows:

At a stated term of the district court of the United States for the southern district of New York, held in the court-rooms, in the city of New York, on the 7th day of December, 1888.

Present: Honorable Addison Brown, judge.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY
against
THE NORWEGIAN STEAMSHIP LUDVIG HOLBERG, HER ENGINES, ETC., Impleaded.

This cause having been heard on the pleadings and proofs of the respective parties and having been argued by the respective advocates, now, on motion of Wing, Shoudy & Putnam, proctors for the claimants, it is—

Ordered, adjudged, and decreed that the libel herein be, and the same hereby is, dismissed with costs.

And it is further ordered, adjudged, and decreed that the claimants herein recover against the libellant above-named the sum of $340.78, costs as taxed, and that unless this decree be satisfied or proceedings thereon stayed on appeal within the time and in the manner prescribed by the rules and practice of this court the stipulators for costs on the part of the libellant and the libellant cause the engagements of their stipulation to be performed or show cause why execution should not issue against their goods, chattels, and credits to satisfy this decree.

ADDISON BROWN.

Filed Dec. 15, 1888.

11 The libellant appealed from said final decree to the circuit court of the United States for the southern district of New York by its petition of appeal, which was as follows:

Circuit Court of the United States for the Southern District of New York.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY, Libellants and Appellants,
v.
THE NORWEGIAN STEAMSHIP LUDVIG HOLBERG, HER TACKLE, ETC.; CHRISTOPHER KAHRS *et al.*, Claimants and Appellees.

To the honorable the circuit court of the United States for the southern district of New York:

The appeal of the above-named appellant respectfully shows—

That on the 4th day of June, 1887, the libellant exhibited its libel in the district court of the United States for the southern district of New York against the steamship Ludvig Holberg, her tackle, etc., and the steam-tug Leonard Richards, her engines, etc., in a

cause of collision, claiming damages by reason of the matters and things set forth in said libel in the sum of sixty thousand ($60,000) dollars and praying that process in due form of law might issue against said vessels, and that the same might be condemned and sold to pay the damages aforesaid, with costs, as by reference to said libel will more fully appear; that thereupon process was duly issued against said steamship Ludvig Holberg, her engines, etc., and said steam-tug Leonard Richards, her engines, etc., and said steamship Ludvig Holberg, her engines, etc., was attached by the United States marshal, but that said process was returned unexecuted as against the steam-tug Leonard Richards, her engines,
12 etc.; that on the 11th day of July, 1887, a claim to said steamship Ludvig Holberg, her engines, etc., was duly filed by the master thereof on behalf of the claimants above named; and on the 4th day of August, 1887, said claimants filed an answer to said libel praying that said libel might be dismissed with costs, as by reference to said answer will more fully appear; that the said cause came on to be heard before the Honorable Addison Brown, judge of said district court, on or about the 16th day of March, 1888, upon the pleadings, depositions, and proofs taken in said cause and adduced by the respective parties, and the said judge, having advised thereon, on the 7th day of December, 1888, made a final decree in said cause dismissing the libel with costs, as by reference to said decree will more fully appear; and this appellant is advised and insists that said decree is erroneous, inasmuch as it fails to decree to libellant the damages sustained by it by reason of the matters alleged in the libel herein; and this appellant for these and other reasons appeals from the whole of said decree to the next circuit court to be held in said district, and on said appeal it intends to have said cause heard anew on the pleadings and proofs in the district court and on new and further proofs to be introduced in the circuit court, and it prays that the record, proceedings, proofs, depositions, and exhibits may be returned to the said circuit court, and that said decree of the district court may be reversed and such other decree thereupon made as to the said circuit court shall seem just, and that the appellees may be condemned to pay to this appellant its costs and damages in the premises.

Dated January 12th, 1889.

SIDNEY CHUBB,
Proctor for Libellant and Appellant.

13 The above-entitled cause came on for trial in the United States circuit court for the southern district of New York on the 18th day of March, 1890, and on subsequent days, before the Honorable E. Henry Lacombe, circuit judge. The counsel for the libellant read the libel and the counsel for the claimants read the answer. All of the evidence pertinent to the exceptions as taken is herein set forth as follows:

Counsel for the libellant, to sustain the issues on its behalf, then read the depositions of Hans Jacobson, Charles Versluys, Anton Antonisen, and William Walsh, seamen of the bark Quickstep,

taken before a notary public in the district court on June 10, 1887. Said Jacobson deposed that before the collision he had been aloft with the boatswain unbending the lower foretopsail. Said Versluys deposed to the effect that before the collision he had also been on the lower foretopsail yard unshackling the sheets, and that at and before the time of the collision the weather was foggy, but the witness thought he could see about a mile, but he did not notice the steamer before the collision happened because he was sitting behind the sail and could not see. Said Antonisen deposed that he had been at the main upper topsail yard for half an hour, unbending the sails of the Quickstep; that the weather was kind of foggy; that he did not see the steamer before the collision; that when he saw the steamer she was on the port bow, and that the steamer struck the hawser about ten fathoms from the bark. Said Walsh deposed that he had been at the main upper topsail yard unbending the Quickstep's sail; that the weather was starting up a little foggy; could not state how far he could see; that he did not look around and did not see the steamer before the collision happened; that he was not looking.

14 Libellant's counsel then read the deposition of JOHN BARTELL, seaman, examined by libellant before a notary public June 10, 1887, who testified:

I was on the maintopsail yard of the Quickstep at the time of the collision, unbending the sails. I had been up there about twenty or twenty-five minutes before the collision. There was a little fog. I could see about half or three-quarters of a mile, I think. I did not notice any land at all. I saw no other vessel while I was up aloft except the steamer and the tug that was towing us. I saw the steamer before the collision happened. She was close to us. I just had time to come from the main upper topsail to the deck. When I first saw the steamer she had already hit the hawser. At the same time I came on deck the steamer went right in.

(By libellant's counsel:)

Q. Could you tell whether she was going ahead at the time?
A. I seen the water rising on her bow.

Libellant's counsel then read the deposition of JAMES DONOVAN, seaman, examined by libellant before a notary public June 10, 1887, who testified:

I was boatswain on the Quickstep. I was on the forward topsail yard, unbending the sails. I first noticed the steamer on our port bow. She passed the tug on the starboard side, and when she struck the hawser the tug was broad off on our port bow. A couple of minutes after that the collision happened. I did not get to the deck before the collision. I was just on the way.

(By libellant's counsel:)

Q. Did you notice the steamer at the time she struck the hawser?
A. Yes, sir.

Q. Can you say whether or not at the time she struck the hawser she was going ahead through the water?

A. Yes, sir; she was going ahead all the time.

Q. At the time she struck your vessel was she going through the water?

A. Yes, sir.

Q. How can you say that?

15 A. If the vessel had stopped she never could have hit us so hard as she did. Our towing hawser was parted between 10 and 15 fathoms from the bow of the bark. The blow of the collision was angling aft. She cut into the captain's stateroom, on the starboard side. After the collision the tugboat give us another hawser, and the pilot told him to tow us into shallow water. He towed us about ten minutes; then she took the ground. The tug's hawser led over the port bow when towing us before the collision.

On cross-examination the witness deposed that they first got into the fog about one o'clock, and that the tug towing the bark had kept her whistles blowing about every ten minutes ever since the fog set in, and that they were going just before the collision; that they usually blew two or three blasts; that he did not know what a fog signal was.

Libellant's counsel then read the deposition of JOHN MCCARTHY, examined by libellant before a notary public June 10th, 1887, who testified:

I was second mate on board the Quickstep, and at the time of the collision I was running forward on the topgallant forecastle. At the time of the collision I could see a quarter of a mile good; heard the tugboat blow several whistles, but could not tell what the signals were. When the tug saw there was going to be a collision and the steamer was going to get foul of us, she sheered broad over to the steamboat's bow and tightened our hawser broad on the port bow. The steamer was bearing right *down* then between the tug and the bark. When she struck the hawser she kept going ahead and never slacked her speed. She was coming very fast on us. She keeled us right over when she struck us, she was going so fast. I don't believe they stopped after they did strike. If the tugboat had ported her helm when the bark ported hers, I think there would have been a collision. The steamer was going right down on top of it. I heard the pilot on the bark order the helm

16 hard-a-port after I saw the steamer, and when he saw the steamer was going to strike he sang out, Hard-a-starboard. The bark was going about five knots' speed, I think.

Libellant's counsel then read the deposition of LEANDER CARD, examined by libellant before a notary public on June 10, 1887, who testified:

I was chief officer of the Quickstep. I was on the forecastle head when the collision took place. I had been there on the forecastle

head about a minute or two; before that I had been down on the main deck. The towing hawser led over the port bow. The steamer, when I first saw her from where I stood on the starboard side of the forecastle deck, appeared to bear about half a point on the port bow. I did not stay on the forecastle deck then; I stepped down aft again. When I stepped down the steamer was right ahead of the tug, about a couple of hundred yards away. When I went up on the forecastle head the second time the steamer was right ahead of the towboat—close to her; not a hundred feet off. Very shortly after that I heard our pilot sing out. I went up on the forecastle deck; then the steamer was right ahead of the towboat; not a hundred feet off.

Q. What do you say as to whether or not the steamer was going ahead through the water when she struck your vessel?

A. No, sir; not when she struck.

Q. She was moving ahead through the water?

A. Oh, yes, sir.

Q. Did you notice whether or not her propeller was moving when she struck the hawser?

A. Yes, sir.

Q. You saw the steamer strike your hawser and parted it?

A. Parted it; yes, sir. If the towing hawser had been cast off when I came up again on the forecastle deck, when the steamer was about a hundred feet away from the tug, it would not have prevented the collision. I saw no change in the course of the tug until the steamer came right down on her; then he sheered off to port.

On cross-examination the witness deposed that there was no one stationed on the forecastle head; that when he went up
17 there he found no one else there; that the reason he went off the forecastle head after he had seen the steamer was to let go the topsail buntline; that it was not the duty of any one to keep a lookout forward on the bark except himself, and that, as he was attending to the men aloft unbending sails, his back was turned sometimes in the direction of the bark's heading; that he heard one signal whistle of two blasts from the tug, and that was all the whistles he noticed; that the witness remembered having seen the buoy on the south end of the west bank a little abaft the beam on the bark's starboard side or quarter; that deponent had lived in New York since 1871; had been familiar with New York harbor during that time, and had used a chart in going in and out; that after the collision his vessel was towed between an eighth and a quarter of a mile till she was aground; could not tell the direction, but she sheered off to starboad.

Libellant's counsel then read the deposition of JOHN LUDDEN, examined by libellant before a notary public June 10, 1887, who testified:

I was a seaman of the bark Quickstep. I was at the wheel of the Quickstep with Larsen. I went to the wheel at four o'clock. I saw

the steamer nearly ahead and very little on the port bow. At that time the tug was right ahead. I heard a whistle, and immediately after the pilot gave me an order to hard-a-starboard and almost immediately after to hard-a-port. I just had time to put the helm hard-a-starboard, when I had to reverse. After that I got an order from the pilot to hard-a-starboard. The steamer was then pointing for our fore-rigging. After that I got an order, hard-a-port, from the pilot. The tug was a little on our port bow then and the steamer was pointing between the two at that time and just on the point of striking
18 the towing hawser. After the tow-rope had parted I got the order hard-a-starboard from the pilot. The spanker boom came down on the wheel after I got it a-starboard. The steamer at the time she struck the hawser had headway; I could tell by the ripple under her bow that she had headway. If she had been going astern I could have seen her back water, and I did not notice any. I saw the tug about two and a half points on our port bow. When the steamer was 150 feet from the tug the tug broadened on our port bow somewhere about three points from the first to the last. The last was when the rope was parted.

On cross-examination the witness deposed that, besides the orders to him, the pilot gave the order, "Let go of the tow-rope;" that the mate jumped down from the forecastle head to let it go, but the steamer parted it as soon as the order was given; that at the time this order was given he thought the bark's wheel was a-port, but was not positive. If the bark's wheel had been kept a-starboard the steamer would have passed the bark on the starboard side. All the changes of the bark's helm did not alter the bark's course above one point at the most.

Libellant's counsel then read the deposition of NEILS LARSEN, examined by libellant before a notary public June 10, 1887, who testified:

I was a seaman on the bark Quickstep; I was at the wheel of the Quickstep with Ludden. The steamer that ran into us bore a quarter of a point on our port bow when I first saw her. The pilot ordered the helm to starboard, then to port, then to starboard again, then to port, and the last order was to starboard. The last order was just as the steamer touched the hawser. The steamer was going ahead then, and also at the time of the collision; I could tell by the bow and the water.

19 This witness also deposed on cross-examination that he heard the pilot order the towing hawser to be cast off about half a minute before the collision, and that the bark's wheel was then a-port.

Libellant's counsel then read the deposition of ALEXANDER J. MORRISON, examined by libellant before a notary public June 10, 1887, who testified:

I was master of the Quickstep. I was below changing my clothes for the doctor's visit and going ashore, when I came on

deck through hearing an order to hard-a-port. I came out of the companion on the port side aft, and saw that the helm was put hard-a-port, and looked around the side of the house and saw the Holberg on the port bow. She had parted the hawser. I noticed she had headway by the ripple under her bow at the time she struck the bark. She cut into the bark about nine feet over all. At the moment of the collision I could not say whether the steamer was backing or going ahead. After the collision the pilot ordered the tow back and asked for his hawser, and it was made fast and she towed us to the upper edge of the west bank, where the bark took the ground in 25 feet of water. I remember passing the "Wyanoke" and "St. Johns." The Wyanoke passed us a good berth—three or four lengths of the ship—on the starboard side; am not positive about the St. Johns, whether she passed on the port or starboard side; it was quite close. She passed us more than five hundred feet off. That was before I went below.

Libellant's counsel then read the deposition of JOHN H. HULPHERS, taken March 8th, 1888, by libellant before a notary public, who testified:

I am master of the steamship Roanoke, in Old Dominion Steamship Company's employ; I have been master in their employ about ten years. On May 24, 1887, I was in command of the Wy-
20 anoke. I was in New York, and on that afternoon at 3.27 left for Norfolk and Richmond. The weather then was warm and hazy and later was foggy. I remember seeing the steamer Ludvig Holberg that day. I saw a bark in tow of a tug that I was told by my mate was the Quickstep. The tug passed me on my starboard hand. I first noticed the Holberg after she came out of the East river. I was behind her. That was somewhere about my leaving the pier, or a little below, perhaps. I afterwards passed the Holberg. The vessels at that time were abreast in the inside of the Narrows. He was to the eastward of us. The Holberg was about one-eighth of a mile off when we passed her. It must have been about 4 o'clock, from the time it took us to go down there. Up to the time of passing, the Holberg had not sounded any fog whistles nor reduced speed. There was no necessity for it. About the time I passed the Holberg I saw the Old Dominion ahead of me. After passing the Holberg I saw two tows. One of these tows turned out to be the one afterwards pointed out to me to be the Quickstep. Those two tows were a good distance away when I first noticed —. I exchanged no signals with them nor did I reduce my speed. I can't tell the time I passed them. I passed the Quickstep about half way between buoy No. 8 at the eastward of the swash and buoy No. 11 on the west bank. As I went down the bay I noticed indications of fog ahead of me. It was coming from the sea. It began to get foggy about 4.20; not very dense; a light fog. I did not slow at that time nor sound any fog whistles. I could see the Old Dominion at the time she had turned buoy No. 8. The fog set in with the Old Dominion sooner than it did with

me. When the Old Dominion was shut in it was clear for me. There is very little difference in the speed of the Old Dominion and Wyanoke. With a deep draft the Wyanoke is a little faster; with a light draft the Old Dominion is a little the faster.

21 At 4.32 we ran into a dense fog. We were then rounding bell buoy No. 8 at the entrance to the swash. I then blew our whistles and slowed down and ran at half speed and stopped occasionally. That was the first I had slowed or sounded our fog signals since leaving New York. I was pretty near abreast of Fort Lafayette when I passed the Holberg; may have been a little past the Holberg when I was abreast of the fort. At that time the Wyanoke was going full speed. She was going about 12 miles an hour. We had the last of the ebb tide with us. Our speed through the water is about 11¼ knots. The tide gradually diminished as we got down towards the Narrows. My judgment of the speed of the Holberg at the time we passed her was about nine miles as near as I can guess. I know my own ship's speed and I know how fast I passed her, and my judgment is she was going nine miles an hour. I must have met the fog before the Holberg. When I passed the Quickstep I think they were in the act of furling the sails or had furled them. The Old Dominion pier is foot of Bank street, North river, pier 26. When I first saw this steamer I was about off our pier and she was about off Castle William. When we got down off Bay Ridge somewhere I was near enough to make out her name. I saw it on her stern, to the best of my recollection. I might have been by the Bay Ridge buoy off Manhattan Beach railroad dock. The Holberg was to the eastward of me and I passed her that way; am not positive as to the color of her funnel. She had two masts, was a little boat, and evidently an English vessel, but saw nothing else below or aloft to identify her unless I saw her name. I saw no other steamer that I passed that day going the same way. The tow that I was told was the Quickstep I rather think was the head one, but I am not positive. The mate

22 said that was the Quickstep; that she don't belie her name. I passed them a good safe distance, a quarter of a mile, I should think. I think Bay Ridge buoy is about two miles this side of Fort Lafayette. Right at buoy No. 8 I ran into the fog. It was dense enough not to see more than 100 to 200 feet ahead. It continued dense up to 6.30 that evening. During that time I had a collision with a schooner. The times I have given I took from the mate's log. They were put down in my presence. I told the mate to put down in the log 4.32 when we passed the bell buoy. I lost sight of the Old Dominion when I was about ¾ of a mile from the bell buoy. I was pretty close to the bank.

Libellant's counsel thereupon read the testimony of JAMES LEYLAND, examined at the trial in the district court:

I am in the employ of the Old Dominion Steamship Company. In May, 1887, I was chief officer of the steamship Wyanoke. On the 24th of that month my vessel was on a voyage from New York

to Norfolk. I keep the ship's log. On that occasion I made the entries of the time and different places that we passed in the memorandum book before I entered it in the log. (Book shown witness.) That is the book. On May 24th we left our pier at 3.27, at the foot of Beach street—pier 26, North river. The Old Dominion went ahead of us. The wind was to the southward; moderate breeze, hazy, at the time we left. Down to passing the Narrows, Forts Lafayette and Wadsworth the weather remained clear. I remember seeing the bark Quickstep; I saw her name with my naked eye. I couldn't say positively where we did pass her, but it was to the northward of buoy number 8; that is the bell buoy at the entrance to the swash channel. We passed her before we got to there. We might have been probably two ship's lengths away from her. By
23 a ship's length I mean the length of the Wyanoke, which is about 250 feet. There was a bell buoy placed on the wreck of the Quickstep afterwards. We met with fog at No. 8 bell buoy, right at the entrance to the swash; it was before we passed it. We couldn't see it when we got abreast of it; we could see it probably a minute or so before that, but when abreast of it we couldn't see it. When we ran into the fog it was 4.32 precisely—that is, when we were at the bell buoy—and we couldn't see it then; then it was dense fog. I have given the time of leaving and the time of meeting with this dense fog from my log book. Those times were noted right at the time when I entered the dense fog. I was then listening for the sound of the No. 8. I put it right down. I looked at the clock and put the time down and the fact that it was a dense fog and the fact that we were then within sound of No. 8. Half a minute or so before that we could see it. About 4.20 I made a note of it being foggy. We ran at full speed until 4.32. I did not notice the Ludvig Holberg; I do not remember passing any steamer in the Narrows to my knowledge. I remember passing Fort Lafayette; I saw it. It was my duty to keep a lookout, and I was forward in the pilot-house. When I saw the Quickstep I looked around and saw the vessel's name—the Quickstep—and I says, That vessel doesn't belie her name in the least; she is as trim a little vessel as I ever see coming into the port of New York. (Reading:) "4.20: Foggy; wind south-southeast; strong breeze. 4.32: Bell buoy; dense fog. 3.35: Battery. 5.30: Scotland light-ship bell; course, south by east." I have no entry of the time when we first slowed, but remember the circumstance then very well. Simultaneously with me putting that down I remember the captain ringing the bell. The first order to slacken speed was at 4.32. At 4.20, when I made the entry of its being foggy, I could then see buoy No. 8, at the entrance of the swash. It was
24 more of a vapor coming along. You could tell it was going to be foggy before very long. The vapor seemed to be blowing towards us or as we were advancing through it, but it was just in patches—very light. What I mean by foggy is that it was very, very light.

Libellant's counsel then read the deposition of JAMES ALLEN SMITH, a witness for libellant, taken March 10, 1888, before a notary public, who testified:

I am a master mariner in the employ of the Old Dominion Steamship Company, and on May 24th, 1887, was in command of the steamship Old Dominion, and on the afternoon of that day I left New York bound on a voyage to Norfolk, Virginia. We left somewhere about 3:15. I saw the Ludvig Holberg that day. I first saw her in the East river just the other side of South ferry, as the Old Dominion was crossing the mouth of the river. It was what I call thick weather, but not foggy. I passed the bell buoy at the entrance to the swash channel at 4.26, according to the clock in our pilot-house. About two minutes after I ran into a thick fog bank, and then I slowed down. I saw the Ludvig Holberg again after seeing her in the East river, and I judged she was then off Hoffman's island. I was then down at the bell buoy. I passed the bark just as we got to the bell buoy. I blew the tug two whistles to go to starboard. She answered those two whistles.

Q. Do you remember what time you passed the Narrows?

A. I think 4 o'clock by our pilot-house clock. The weather at that time was clear, but thick, warm, and hazy. I could see on either side of the Narrows as I passed. The fog was setting in from the sea. The log book is kept on the Old Dominion, and the times of departure and arrival kept there. That is always so on every trip. I was in the pilot-house at the time the entries were made that day.

I never leave the ship till she gets to Scotland lightship. I
25 didn't see the bark's name. I didn't know what bark it was at the time. I knew what tug it was. A bark was sailing up an eighth of a mile ahead of the tow.

Q. How did you know that that was the Quickstep?

A. I got a Herald the next day, and I know it must have been her. I saw her there afterwards. The bark was heading up a little more, and the other bark in tow was swinging out from No. 8 buoy to give me an opportunity to pass between the two. I ran full speed until after I got in the fog.

Libellant's counsel then read the testimony of EUGENE W. CATES, examined on trial in the district court by the libellant, who testified:

I am chief officer in the Old Dominion line. In May, 1887, I was chief officer on the steamship Old Dominion. I kept the log of that vessel that day. I had a scrap log on which I made the entries of the occurrences of that day. That is the log, and in my handwriting. We left New York—left our pier (referring to log book)—3.23; we sailed. Our pier is 26, North river. Passed the Narrows (referring to log book) at four o'clock. I made the entry at the time. The weather was cloudy, but you could see about three miles. We had not slowed down; running full speed. We met with fog that day at No. 8 buoy. That was at 4.26. We ran right into a bank, a heavy bank of fog, just as we were rounding No. 8 buoy—a dense

fog. We slowed and blew our whistles. Down to that time we were running full speed. I saw the bark Quickstep that day. We passed her about half way between No. 11 on the west bank and No. 8 at the entrance to the swash channel. At the time we passed her it was overcast, but you could see probably half a mile. We passed the bark about three ship's lengths off—I mean our ship's length. The length of the Old Dominion is 265 feet.
26 We passed her starboard to starboard. After we ran into thick fog it was dense, and then it would clear and then be foggy again. We had a collision about 6.15 p. m. No. 8 is the turn-buoy, as we call it—the bell buoy. The entries from the book are as follows: "P. M.: 3.23, sailed from New York; overcast. 3.31, Governor's island; strong south-southeast wind. 3.51, Bay Ridge buoy. 4.00, Narrows. 4.07, Craven Shoal buoy. 4.26, No. 8 buoy; thick fog. 4.42, Sandy Hook buoy." This whole page appeared written in lead pencil.

And on cross-examination the witness was asked to explain what appeared to be an erasure on the line after the words "Craven Shoal buoy," showing what claimant's counsel claimed were the partially erased letters "th," after figures "4.07," but the witness denied that the entries had been changed. The district judge presiding at the trial after examining the entry in question asked the witness:

Q. Your answer means that you do not see any marks of a rubber eraser on that line after the words "Craven shoal"?

A. No, sir; I don't.

Q. (Handing the book again to the witness.) Won't you look at it again?

A. All I see is it looks a little dirty; that is all I can see. No, sir; I don't see anything there.

Q. Look at the entry "3.23, sailed." Don't your eyes show you there has been an alteration there?

A. No, sir.

Q. Can't you see that?

A. No, sir.

Q. Look under the word "sailed." Don't you distinguish that there?

A. There is something right there. Yes, sir; it looks a little dirty.

Whereupon the court stated: "On examining the original entries throughout the book, all of which are made in pencil, I find there are various changes or rubber marks showing an erasure and words written in." The page containing the entries referred to was marked "Libellant's Exhibit No. 2."

Libellant's counsel also read from the further examination
27 of the same witness on appeal in the circuit court before the United States commissioner on December 28th, 1889, by libellant, and who further testified:

I copied the log from the pilot-house log (same book as was produced in pencil in the district court) that was kept in lead pencil as soon as the ship arrived in Norfolk. It has been my practice to copy the pencil log, in the way I have mentioned, ever since I have been in the ship, since 1885. (Log book written in ink shown witness.) That is the log book of the Old Dominion, commencing October 12th, 1884. The entries commenced in my handwriting in this log April 14th, 1885, and all of them after, down to July 16th, 1887, which is the end of that log book. The entry under date of Tuesday, 24th May, 1887, was written by me on the 26th of May, at Norfolk. I have been in the employ of the Old Dominion Steamship Company ten years. I have been first officer since 1882, and am now on the steamer Guyandotte as first officer.

Mr. Black, for libellant, read in evidence from the log book of the Old Dominion the entries under date of May 24, 1887, as follows:

"P. M.: 3.23, sailed from New York; thick weather; fresh S. S. E. wind. 3.33, Gov. island. 3.51, Bay Ridge buoy. 4.00, Narrows. 4.07, Craven Shoals buoy. 4.26, No. 8 buoy; dense fog; strong S. S. E. wind. 4.42, Sandy Hook buoy. 5.08, outer channel; heavy S. E. swell. 6.30, fog lifting; overcast; very thick fog. 9.30, Barnegat; weather clearing some. Draft, 10.07 A., 10.05 F." I have given no fractions of a minute; it might happen that the thing passed was passed between the two minutes, so as to be passed a fraction of a minute, but I have never been accustomed to put it down. The bearing of the object passed at the time I noted passing was abeam—at right angles to our course. We followed the channel course in going down from New York to buoy No. 8.

28 (Claimant's counsel calls on libellant's counsel for the production of the scrap log, or the page of it marked Libellant's Exhibit No. 2, which was cut out and which is not reproduced in the apostles.

Libellant's counsel states that he has not got the log and has never seen it since the trial and does not know where it is.)

Q. Do you remember on the trial that a page or leaf of the pilot-house or scrap log was cut out in court?

A. No, sir; I do not remember seeing it cut out. I remember seeing the leaf after it was cut out, and the leaf was handed up to me when I was on the witness stand. I don't know what has become of that leaf.

Libellant's counsel then read from the deposition of NATHAN WOOD, a witness for libellant, taken March 15, 1888, before a notary public, who testified:

I am one of the Jersey pilots; have been a pilot twenty-three years. I was pilot of the bark Quickstep on the occasion of the collision with the Ludvig Holberg. The bark was towed upon an 80-fathom hawser made fast, one turn around the bitt on the topgallant forecastle and backed over on the topsail sheet bitt. When

I first saw the steamer Holberg I was about half way from buoy No. 14 to buoy No. 11. No. 14 is on the north end of the upper middle and No. 11 is on the south end of the west bank.

Q. As you approached the place of collision how did the weather continue?

A. It came in thick. The collision happened about 4.25 or 4.26 p. m.; right to the eastward of where she lay ashore; just to the southward of the south end of the west bank; near buoy No. 11; a little to the southward. Before the collision I saw three steamers, the St. Johns and two Old Dominion boats; side-wheel steamers. When I saw them I should say they were 150 feet to the eastward, on my starboard hand. Both Old Dominion boats passed me on the starboard hand. The St. Johns passed me on my port hand. The two Old Dominion steamers were, maybe, three-quarters of a mile apart. The Old Dominion steamers passed about 150 feet to the eastward from us; the St. Johns about 100 feet off. I passed the first Old Dominion steamer just after turning; about half way between buoy No. 8 and the entrance to the swash and buoy No. 14 on the north end of the middle. I passed the second Old Dominion steamer abreast of buoy No. 14, and I passed the St. Johns half way between the two steamers, between the buoy on the middle and the buoy on the upper middle, on my port hand—buoys No. 8 and 14. We did not signal any of these steamers that we passed. The Quickstep had nothing on but one topsail, which was unbent. When I first saw the steamer Ludvig Holberg I was standing on the poop at the port side, forward of the mizzenmast. There were two men at the wheel; the captain at that time was in the cabin; the captain came out just as the collision happened. The men were at work unbending sails and stowing them away. The chief officer was attending to getting the sails out. I had charge of the management of the bark. At the time I saw the Holberg the tug was right ahead. When I first saw the steamer Holberg I could see her starboard side right ahead, ranging across our bow; the tug gave her two whistles and the steamship didn't answer, and then I see the steamship ahead was directed to starboard, and by that the towboat gave him one whistle and ported her helm, and I ported aboard of the bark at the same time. The tugboat blew first and then ported, and I ported and then got an answer of one whistle. When the tug sounded her first two whistles our course and the tug's course were changed; we starboarded, changing the heading of our bark about a point. My heading before that change was by compass; north by east half east. After the one whistle of the tug and our changes—immediately after, say maybe eighteen seconds—the steamship blows two whistles and starboarded his helm to avoid being run into. I starboarded, too. At the time those two whistles were sounded by the steamer she was right ahead—I should say she was about 200 feet away, ahead—of my vessel. The tug was just clear of her bow. The tug starboarded her helm just immediately after the last signal, and I ported so as not to get run into. I see she was coming between the two vessels. The steamer

struck the hawser and parted the hawser, and I immediately hailed her to starboard, thinking by making a glancing blow we might go clear, but the steamer's anchor davit caught inside our port braces, and she hit the bark's hull about six or eight feet abaft the mizzen rigging, and the spanker boom came down on the wheel, and that crippled us. We could do no more. The bark didn't sink there; she sunk just to the west. I sang out to the tug to go ahead, and I ran her in. When I first saw the steamer she was going ahead. As she approached she was going ahead. Before the collision happened she did not stop her headway at all; she fetched up into the bark. At the time she struck our hawser she had headway—I could see by her propeller. The water was flying under her bow and she was going pretty fast, more than half speed. After we blowed the two whistles we seen the steamer's head going to starboard; I mean the two whistles that were not answered. I could see all along her starboard side when we blowed the two whistles. He never answered them two whistles, and immediately I saw the steamer's head was going to starboard under a port helm. The steamer made a change of course of two points. She was about a third of a mile away at that time. We were being towed as fast as between four or five knots at the time of the collision. After
31 the collision I didn't sound; we hadn't time. I suppose there was 38 feet of water where she struck us. We were towed after the collision about two lengths of the ship to the westward. She was settling fast. After coming out of the swash channel my course would be north by east, and I gave her half a point more to the eastward to make my course good up the channel. The width of the navigable channel at the place of collision I should say was a mile. The collision was right in the centre of the channel. At the time the Holberg passed the tug starboard to starboard from the side of one to the side of the other was, I should say, ten feet. Of course we have the towboat on one bow or the other a little, whichever the hawser is on, and we found when she took the hawser it partly caught the steamer on the starboard bow, and I ported the helm to make a space, so that the two would not come together. The tugboat bore one and a half points on my port bow at the time the Holberg was ten feet away from the tug. She just starboarded then to keep clear of the steamship. If when the Holberg was passing the tug the Holberg had starboarded and kept her wheel starboard, there would have still been a collision. The Holberg, at the time she was passing the tug, could not have done anything then to have avoided the collision. Before then she could have backed onto her and backed clear. It was too late then. I think the steamer was heading south half east at the time. I could see her starboard side right diagonally across.

Libellant's counsel then read the testimony of JOHN DEVLIN, examined by libellant on trial in the district court, who testified:

I am a member of the police force of Jersey City at the present time. On May 24th, 1887, I was mate of the tugboat Leonard Rich-

ards—the tug that had the bark Quickstep in tow. The
32 weather was hazy. Our tug had not sounded any fog whistles. When we first saw the Holberg she was about half a mile away. That was about as far as you could see at that time. I saw two of the Old Dominion boats pass us on our starboard side. I suppose we saw them half a mile, too. I saw the St. John. She passed us on our port hand. She was not going the same way we were; she was going the other way. The captain of the Richards blowed two whistles to the Holberg and he answered with one. The captain of the Richards answered that one whistle by one. Afterwards the captain of the Richards blew another single blast of the whistle. That was all I heard. Those two blasts were less then half a minute apart; might have been five or ten seconds less. There was no clock in the tug's pilot-house. We passed the Holberg on her starboard side; starboard to starboard. When he answered with the one whistle we put our wheel to port and the Holberg ported his helm also or, at least, he took that sheer and finally he steadied. The vessel acted as if they steadied their wheel and put it to starboard again. That is what led the captain of the Richards to blow the second whistle of one blast and put the wheel to starboard. When we heard that reply of one then we gave back one. That is the time we ported our wheel. We blew another single whistle after that, because he appeared to be coming down onto us under a starboard wheel again; kept heading right at us all the time. We kept our wheel to port all the time until the Holberg got so close we thought she would run over the top of us and we had to hard-a-starboard our wheel again and come up on the starboard side. He missed us by about 25 feet, I guess.

Libellant's counsel then read the deposition of CHARLES McDEVITT, taken by libellant, on appeal to the circuit court, before a United States commissioner April 6th, 1889, who testified:

33 In May, 1887, I had charge of the tug Leonard Richards; towed in the bark Quickstep; weather was hazy that day. The upper buoy of the middle is called H and the lower buoy of the middle is called S. The course I was headed on when I first saw the Holberg was about N. by E. half E. When I first saw the Holberg she bore about north or somewhere around there. She was pretty near ahead. She showed her starboard side to me. By the course she was steering and the position I was in, I thought she was going to pass to the eastward of me. When I first saw the Holberg I blew him two whistles. I couldn't exactly state how far off she was then. I could only guess at it. After blowing the two whistles to the Holberg I got an answer; the answer was one whistle. She was heading, I should judge, about south. We were heading about north by east half east. She was pretty near ahead, showing her starboard side, as if she was going to cross us. She didn't change from showing her starboard side between my first signal of two whistles and her answer of one whistle until after she blew one whistle. She come down about head on, as if he ported his wheel. To his signal of one

whistle I blew him one whistle and ported my wheel. I wouldn't want to swear how far away she was then. I couldn't exactly state. The Holberg didn't seem to port her wheel enough to clear me. He still kept coming head on to me and I blew him one more whistle. I got no answer to that whistle. He was getting very close then. After blowing that last one whistle I slowed the tug down. She had been running hooked up, going 4½ to 5 miles an hour up to that time. After the second single whistle which I blew I didn't see any change in the Holberg and I continued on my course. She was heading about right at us. At this time I was about the middle of the main ship channel—the center—as near as I could get to it. I wasn't looking for channel buoys about that time,
31 but I could see from one buoy to the other. The next thing I noticed that he was keeping right ahead for us. I noticed he was not steering the vessel to clear us. I thought he misunderstood the signals or something. We didn't do anything until he put his wheel to starboard. Then he was pretty near on top of us, and when he put his wheel to starboard we had to put our wheel to starboard to save the boat. Before putting our wheel a-starboard at this time our wheel was a-port. When I sheered to starboard I could toss a biscuit aboard of her. She just cleared us and no more. I passed to the westward of the Holberg. We passed starboard to starboard. The Holberg was moving through the water as she went by me at a pretty good gait—I should judge about six or seven miles an hour. When we slowed down at that time I don't suppose our speed was over a mile an hour. We might have been going three. We couldn't tow the vessel over five. I don't know that I could see people on the bridge or deck of the Holberg when she whistled first at that distance. When I answered I did not take any notice, but I noticed them when she came up within about a length. I knew the pilot. I saw him just before the collision occurred—before he passed us. He was close by us. We tried to cast the hawser off before she struck it. The deck hand, the cook, and the fireman tried to do that.

Q. You saw that?

A. Yes, sir. It was not successful, because it was done too quick. Before they got it cast off the bitts she had it cut in two. We didn't expect her to pass between the bark and the steamer. If we had expected that we would have had men standing there with an axe to let it go. After the collision we rounded to and went right back to the bark and gave them our hawser, and I towed her to the west-
ward to get her out of the channel before she sank. We might
35 had pulled fifteen and might have been twenty minutes. We pulled from a mile to three-quarters—somewhere around there. The direction from the place where the collision happened was, I should judge, about northwest. We were heading to get as close to the west as we could as quick as possible—to get the shoalest water. After the collision I came back to the bark and threw a heaving line to the bark, and then they hauled in our hawser and made fast. I didn't give her much of a hawser, because we were in a hurry. We held her as short as we could. Then I towed her in

till she took the ground. I think I must have towed her half a mile or three-quarters before she sunk. We towed her very fast. We were in a hury to get her in before she sank in the channel. We didn't get her in any too soon. I think it might *ne* fifteen or twenty minutes after the collision that she sank. I didn't tow her more than four miles an hour. I towed her three-quarters of a mile or somewhere about that. It may be three-quarters or a half or a mile. You have no means of measuring the distance. It didn't take me but a very few min-tes to come back to the bark and get our hawser to her. I don't suppose it took over three or four minutes, if it took that. We had nothing to do but get right round and go alongside of the bark and hand them our rope. After she sank I let go the hawser and came up alongside and took off the captain, and the pilot came in a small boat alongside of me. After the collision the tug John Smith towed a bark or a brig up past. I could tell the boat plainly from the place where we were lying. That was after the collision, when I had to pull the Quickstep to the westward. There was a light fog, getting thicker all the while. It looked thick, and fog banks ahead, looking up ahead as we came up towards the Narrows. At the time of the collision I hadn't the least idea how we were heading; might have been heading to
26 the west, for all I know; but we put her to starboard to clear the steamer and didn't take any notice of a compass or anything like that just at that moment. I starboarded my helm to avoid the collision. You can manœuvre a tug up much handier than you can a heavy-loaded vessel. In my sworn report, made the next day after the collision, I stated, "About 4.30 p. m. sighted a small steamer." That time must have been as near right as I could get. I do not remember whether we had a clock in the pilot-house or not. I do not remember looking at a clock. I first saw the Holberg showing her starboard. I could see her whole broadside—her whole starboard side. That was her course crossing me. I should judge she intended to go past to the eastward of me. In the position the vessels were I thought two whistles would be handier for both of us. He answered my two whistles with one. I should say a few seconds after we blew two whistles. After he blowed his two whistles he kind of manœuvred the vessel so that I saw he ported his wheel, because he altered his course and comes head down towards —. You could see him head on, and before we could only see his starboard side; and after I blowed the two whistles and he responded with one he must have ported his wheel, because the vessel changed her course and come right down head for us. Then I blowed him one whistle to let him know that I understood him, giving him the right of way, and he didn't seem to alter his course enough to clear us. He still kept coming on that course, head onto us, and I blew him a second whistle to let him know I understood him. Then we were getting pretty close together. He must have starboarded when he was right close to us; I should judge maybe a couple of lengths from us, and I said to the mate, "What's this fellow going to do, try to sink us?" And just at that

minute we had to put our wheel to starboard to clear him.
37 I didn't starboard until the last moment. The steamer only appeared to starboard but once after it came in sight. When the tug blew the first two whistles the wheel was put to starboard. So I think we starboarded first. I did not make any record of this collision; have had nothing to aid my recollection for these two years and cannot now undertake to tell everything exactly that happened then and may easily be mistaken on any one of the small points. I only heard the Holberg blow one whistle. That is all I can remember.

Libellant thereupon rested its case.

Claimant's counsel then read the deposition of Carl Konrad Johnson, examined before a notary public on behalf of the claimants on June 29th, 1887, before issue joined.

Before proceeding with the examination proctors for the libellant requested proctors for said steamship, as an answer had not yet been filed, to state the defense and the allegations of the answer before beginning said examination. Counsel for the steamship thereupon stated: "We allege dense fog, which began at the time the Ludvig Holberg was approaching the Narrows, at about 1 o'clock p. m. of the day of the collision," and other statements of the navigation of both vessels and faults charged against libellant that are not relevant to these exceptions.

Whereupon CARL KONRAD JOHNSON testified:

I was on board the Holberg at the time of the collision on the 24th of May last; was second mate; have been a mate of steamers over two years; had been three months on the Holberg. When she got outside of Governor's island I went forward to help them to get the anchor in. It had been hanging outside by the hawse-pipe. I helped get it in on the forecastle head. The steamer had then got about
38 right abreast of the upper part of Staten island. After I got the anchor in I swept the deck; then I went down to get my supper; when I went down we were about abreast of quarantine station, just before coming to quarantine station; the weather was clear before my going in. I stayed down below about five minutes; then I went up on deck; heard our own whistle; it was then dense fog; as I was going up on deck I heard the gong going in the engine-room—telegraphing from the bridge; it struck once; it never strikes more than once. I could not see either side of the Narrows; then I could not see anything at all. I could see on the water about 40 fathoms. Then I went forward from the forecastle to the lookout on the port bow; soon after the chief mate came up to me; he was on the starboard side, close to the stem; as close as you could come; only as many as three men can stand in there; it is close to the forestay. Just after that others came forward there. While standing there I heard the whistle from our steamer every minute. I did not see any land at all on either side as I went through the Narrows before the collision. From the time I came up from below I could see nothing at all.

Q. Did you hear any whistle ahead of you?

A. Well, I heard a whistle which came up—a whistle ahead which came up—but I was not sure first of it, and afterwards I heard a whistle and reported it to the bridge—a steam whistle ahead, a little up on the starboard bow. I could not see anything of it, but soon after I saw the tugboat come out of the fog, and when he came out he blew two sharp blasts and the steamer gave two short blasts on the whistle. I reported it. It gave two short blasts on the whistle—the tugboat did—and it looked to us as if he gave the starboard helm; then our pilot answered with two short blasts and gave the starboard helm; the tugboat blew the two whistles immediately after I first saw the tug, as he came out; our answer was given quick afterwards. The pilot gave the order to starboard. I couldn't see the bark then. I couldn't see any hawser. The next thing I saw was the bark on our port bow; then the tug was right on our starboard bow about a ship's length off; she was steaming off from us; she was about seven points on our starboard bow; she was almost fully abreast of us; the bark was about three points on our port bow. I reported the bark then; then there was a signal from our pilot to stop the engine—reverse the engine and hard-a-port the helm. The bark at the time I first saw her was about 40 fathoms off on the port bow and the tug was seven points on our starboard bow—about a ship's length off. I and the chief mate remained at the stem until she struck the hawser; then I ran amidships; when the vessel struck I was amidships, underneath the bridge; the chief mate ran back, too. I saw the vessels come together. When she struck the hawser the Holberg was about 15 fathoms from the bark's stem. There was no one on the bark's forecastle head then that I could see, and I could see the forecastle head all over. Before the collision our pilot, the captain, and myself sang out in English to the tug, "Cut your hawser." Before the Holberg struck the hawser she was headed to the port side of the bark; if the hawser had been cut I think she would have gone clear or it would not have been so serious. I noticed the hawser was 2½ or 3 inches in diameter. When the steamer hit the hawser it would swing her a good deal; she was light, drawing only 8 or 9 feet forward and about 13 feet aft. After the collision we looked at the bark and tugboat to see what the tugboat would do, and we remained there until we saw the tugboat was going outside of us; then we went on and got aground. I cannot say which way we went, but a few minutes afterward we were aground close to buoy No. 11. I saw the buoy; we were lying close to it; it lightened up five or ten minutes after the collision. We were inside the buoy then. We did not remain aground long—about five or ten minutes; the tide was coming in; that floated us off. I saw no other buoys before the collision. Our steamer went on after floating off and anchored off Sandy Hook, because the fog was dense. Before the collision I judged the bark was approaching us at a speed of 7 or 8 knots. The Holberg at the time I went down to supper was abreast of

Staten island; she was about a mile from the fort; when I went below for supper it was four o'clock.

Q. Are you positive of that?

A. Yes; four o'clock; it was about four o'clock; not after four o'clock.

Q. How long did you stay below, getting supper?

A. About five minutes, I think. I did not get any supper. I was going to have it when they blew the whistle, and I went on deck. It was my watch at the time. It was early for getting supper, but they could relieve me then. When I came on deck the vessel, in my opinion, was just about abreast of the fort in the Narrows, but I couldn't see anything. I looked, of course, when I came on deck, but I could see nothing at all. I heard one whistle from the tug before I saw her that I am sure of. I heard one before that I was not sure of; then I heard one that I was sure of; all single blasts. I saw the tug and I reported her. While I was reporting her she blowed two short blasts. About a minute after hearing the second whistle I saw the tug. At the time I was reporting the tug she was heading on our starboard bow about a point. She was coming that way with her starboard bow. As soon as she saw us we could see her. They came on the starboard about half a point off our bow. I mean that he shifted his helm; he got more off; he showed more off to me; more off his own starboard side. She had not altered less than two points to her own port.

Q. Can you form any opinion how fast you were going when you saw the tug?

A. Two or three knots. I had been looking over the side and forwards, and I know she was going at slow speed then before we saw the tug. I saw the telegraph dial move to go slow. I could not see the face of the dial, but could see the handle of it. It looked to me as if the bark also altered her heading after I first saw her a little to her own starboard side.

Q. How close do you think your steamer was to the bark when you saw the dial move the last time to the engine?

A. The last time she was 40 fathoms off. When I saw the bark there was an order "Hard-port your helm." The engine was stopped and reversed at once. When the Holberg struck the hawser—when I came aft from amidships, the propeller water was coming up from amidships. That told me the steamer was dead. She had not gathered sternway on. I stood amid-ships close to the port railing under the fore-part of the bridge when they struck.

Claimants' counsel read the deposition of Otto Bussau, called and examined by claimants before a notary public on June 30th, 1887, who testified:

I am 34 years old; have before been on American steamers I have been mate of the Holberg a month and a half. The captain of the vessel is my brother; was forward as the steamer went down the bay. I got the anchor up and got some lashings round it—two chain lashings—and when the fog set in the

captain sung out to leave the lashings off, and then I took the lashings off again to have the anchor ready, excepting two turns; left two turns only to have it ready. That was the starboard anchor. The steamer, when he gave the order to take off the lashings, was then abreast of quarantine sta-
42 tion; not at the forts; by quarantine station—between the two—between the station and the fort. I did not see the fort. I saw the quarantine station. I did not see land on either side as I went through the Narrows. After I had taken the lashings off the anchor I stood right forward. I stood on the port side of the forestay, which is fast to the upper part of the stem. The second mate was forward, too, on the other side of me; the two men were right forward just behind me at the windlass. I heard our whistle as soon as the fog set in. They kept it going continually. I heard another on the port side, a steamer. I did not see it. It was too foggy to see anything. About ten minutes after the fog set in, I believe, as near as I can recollect, I heard a whistle very near, right nearly abreast. I did not do anything then except to keep a sharp lookout and reported it to the captain and the pilot on the bridge. After that the next thing was a whistle on the starboard bow. I didn't see anything at all. I didn't report that on the bridge because I took notice that they heard it on the bridge. I could see that they heard it. I could tell by the way the whistle was blowing that they heard it at the bridge. That bore from me when I first saw it on the starboard bow about a point, 40 or 50 fathoms away. I heard two whistles from his pipe, the Holberg answered with two blasts, and at the same time put our helm hard-a-starboard. The next that occurred the tugboat come on to us and our ship went over till we got the tug about seven points on our starboard bow; then I saw the shadow of a vessel, but it was so thick I couldn't see what kind of a vessel it was just at the time. I saw the shadow, and then I saw it was a bark. When I first saw her I saw the lower part of her rigging—her lower masts. We were about 40 or 50 fathoms away from it—40 or 45—some-
43 thing like that. I cannot *say* exactly say how many fathoms. When the bark was seen I heard blasts from our steam pipe, and at the same time our helm hard-a-port, which the captain assisted in. I saw two or three men coming down the bark's rigging, and I saw another below on deck, near the forerigging abaft the foremast, looking up with his back to us. I could see that there was nobody on the bark's forecastle head. When I first saw the bark I could not see she was towed on a hawser; when I first saw the towing hawser I should think it was about 20 fathoms off. I saw the steamer strike it. I ran then to the bridge, to the port side; the hawser was struck before I got there. All the other men left the bow before the collision. I heard our master, pilot, and second mate sing out to the tug to cut the hawser. Nothing was done on the tug. I saw a man stand there with hands crossed; he didn't move at all. Had the hawser been cut at the time we sung out to do so, I think we would not have had any collision, or only a slight touch; in my opinion we would have gone nicely clear of the

bark. The course of the bark from the time I first saw her up to the time of the collision was, to the best of my judgment, about northeast by north or northeast by north half north. So far as I could judge, she was on the port helm. When we first saw the bark 40 fathoms off she was coming pretty fast; probably five knots. I saw nothing done to diminish her speed before the collision. As I ran aft from forward I noticed the speed of our steamer; it was very slow. I should think about a mile an hour. After we got clear we swung a little, then we got aground. We lay aground about 20 minutes or half an hour. The tugboat came alongside of us while we lay aground. The bark was lying keeled over when the tug came, 100 or 120 fathoms from the Holberg. It cleared a little after the collision and then it came on thick
44 again. This is the log book. I kept it. The place where I made entries for the 24th of May is page 102. That is correct. There is another place where it is more extended—page 316. The first entry was made after the collision—after we came to anchor; the same day as the collision. That extended entry—page 316—I made the next day, in the afternoon. It is written in the Norwegian language, and is translated into English as follows (page 102): At 3 p. m. Tuesday, the 24th, left with pilot on board from New York. At about 4 p. m. dense fog set in, for which reason the speed was reduced to half speed, and soon afterwards to slow. Steamer's whistle was kept going all the time. Another's whistle was heard right ahead. In a few minutes afterward we saw in the fog first a tugboat and afterwards a bark, which the tugboat had in tow. After a strange manœuvre of the tugboat the collision occurred exactly as set down in log (see page 316). The fog continuing dense, at 8 p. m. anchored off Sandy Hook, with 25 fathoms, starboard anchor and chain. Page 316 *et seq.*: Tuesday, 24th May, about 3 p. m., Ludvig Holberg left pier 15 East river; wind south—stiff breeze; pilot and captain on bridge and crew on deck. The course was steered down the river, according to the pilot's order. About 3:30 p. m. dense fog set in, whereupon the steamer instantly was given half speed, and about fifteen minutes later slow speed. The steamer's whistle was kept going, according to the rule. About 4 p. m. a steamer's whistle was heard forward. Next blast of whistle was heard a little on starboard bow, and immediately afterwards a tugboat was seen about half a point on our starboard bow—a good ship's length off. The pilot ordered starboard helm, which was given. A few minutes afterwards a vessel was seen, which proved to be a bark, a little on our port bow and apparently under a port helm. We changed now instantly our helm port, in which
45 the captain himself assisted. The bark was now seen to be towing by a tugboat, and, as the collision now appeared to be inevitable, the engine was stopped and full speed astern was given. The bark, at pretty good speed, advanced quickly up towards us. It is to be noticed that the bark had her upper topsails set. The bark was now on our port bow and the tugboat on her starboard bow, and the tow-rope was kept taut, crossing our bow. The collision would certainly have been avoided if the tow-rope had

been cut, which the captain and pilot several times called out to the tugboat, but of which no notice was taken; on the contrary, kept taut. The tow-rope now took our starboard bow. It was immediately broken, and at the same time sheered our bow on the bark's port quarter, cut in aft of the mizzen rigging, cutting out quarter and poop to the water line. Soon after the collision the fog lifted somewhat and the bark was, so far as we could see, being towed into shallow water in a sinking condition. We ourselves got no apparent damage, as far as we have observed. According to the pilot's statement, the collision occurred right abreast of west bank. There was no time after the fog set in before the collision that you could see the land on either side of a vessel half or a quarter of a mile off. When the steamer struck the hawser I think it swung our bow off about three-quarters of a point. Our course was a southerly course—about south. Our course was south half west by compass. When I made the entry the next day I did not make it directly on the book. I first wrote it down on a slip of paper. Then I wrote it in the book immediately. The first, written right away after the accident, I did not write on a slip of paper. That I wrote in the book at once. I don't remember exactly what time we passed quarantine; about half past three, I think, or ten minutes of four.

After the steamer left the pier, after she got fair headway,
46 she was going full speed—nine knots. The second mate was aft, first, helping. Then he came forward. After he came forward he went down for about a minute—just shortly before the fog came. He was going down to get a cup of coffee, but he came back again. When he went below my vessel was about abreast of quarantine station. I should think we were more near the fort. I cannot tell.

Q. If you were to the southward of quarantine station, how much do you think you were to the southward of it?

A. Not much. I think we were at the southward end of it.

Q. And you think it was about four o'clock?

A. I guess about four; perhaps a little after four when the second mate went below to get a cup of coffee. The second mate came to the forecastle again when the fog got thick. He had been below, and then came forward after he had been below a minute or two minutes. He did not assist me. He was standing forward. He had no duty at all there. When the fog shut down thick I think we were between the quarantine station and the fort on Staten island.

Q. Well, can you tell about what time it was that the fog shut in thick?

A. Yes; I can tell about.

Q. What time?

A. About 10 or 15 minutes past four. I don't know where the collision happened; it was thick, foggy; I couldn't say where we where; I didn't see any buoys; I had no watch with me. When our bow struck the hawser first the tug was on our starboard bow, I should think about seven points off, right close abreast, with our bow to the hawser; the smokestack then nearly abreast, a little point

forward on the beam. The bark bore across our bow; I think it was northeast by north or northeast by north half north two and a half points on the port bow; about south half west was our course; the tug's was about north half east. The last land I saw was quarantine station. I did not take notice exactly how far off the land was. We were in the channel; in the main channel; out
47 in the fairway as we call it. I did not notice the land on the other side. I saw the quarantine station and did not notice much more. I cannot remember how far off the quarantine station was; a mile and a half or three quarters, perhaps (referring to the log book). I call it a strange manœuvre when a sailing vessel in towing after a tug, if he can not see the tug and don't keep after it. If he had done that there would have been no trouble; but the tug was going one way and the sailing ship the other.

Q. Can you tell about where your vessel was at the time you slowed?

A. At the time we slowed?

A. Yes (repeating question).

A. No; I don't remember where; if I could tell the vessel's speed exactly.

Q. (Interrupting.) Do you know where your ship was at the time she slowed?

A. Well, our ship was then between quarantine station and the fort.

Claimants' counsel then read the deposition of NIELS OLSEN, taken before a notary public on behalf of claimants, through an interpreter, on June 30th, 1887, who testified:

I am carpenter of the Ludvig Holberg; was forward on that vessel. The weather was thick; could not tell what was the last land I saw. Whistles were being blown on our steamer. I did not see either of the forts as we went out of the bay. After the whistle, somewhere on the port bow, the captain told us to go forward and clear the anchors again. We got the anchors clear and I stood forward, right forward in the eye of the bow, on a little platform there, according to the captain's orders, to have the lookout. I stood about midships, a little over to the starboard side of the forestay. Then I saw a tug off on the starboard bow. When I first saw it it was about two ship's lengths away. I heard two whistles from it. I heard two from the steamer Holberg. I couldn't see the bark then. Three or four minutes after I saw the
48 forward part of the bark; then we saw the bark on the port and the steamer on the starboard bow; I could see the towing rope then; the tugboat was about abeam. The bark when I first saw it was close on, two ship's lengths off—I mean two lengths of the steamer—between three and four hundred feet. Our captain and pilot sung out to the steamer that he should cut the hawser, but the hawser did not get slack; it was taut. Myself and the first and second mate saw the bark all at once. The mate said, "Let us go aft, because there will be a collision." I went amidships. I

saw the vessels strike. I have measured the Ludvig Holberg. It is 80 feet from the stem aft to the bridge. The bridge is six feet and 6 inches above the deck. The forecastle head is only eleven inches above the main deck. The work at the anchor could not have taken more than five or ten minutes. The second mate was not forward all the time I was there. He came forward when the captain gave orders to get the anchors ready for use again.

Q. How soon after the captain gave those orders to get the anchors ready for use did you see the tugboat?

A. It might have been five or ten minutes. At the time this tugboat was discovered we had taken the lashings off the anchor, and had two turns left round one fluke at the time we saw the tugboat. The second mate was not helping to do that; he was standing alongside of the mate, looking ahead; I stood forward of the second mate; he stood about abreast of the chock; there was nobody forward of me. I perform the duties of a lookout at sea. I got my orders this time to go on lookout from the captain. It was foggy then. When I went forward on lookout the Holberg was just below the first fort on Staten island. I had been on the lookout towards half an hour when the collision took place. From the time the captain told me to keep a lookout forward I did not do
49 anything to the anchor. I stood there on the lookout after I got through working at the anchor up to the time the mate told us to go aft, which was just before striking the hawser. The fog did not come all at once; it came with the wind. At the time it began the fort on Staten island was a little abaft our beam. From that time up to the collision the fog was getting thicker and thicker.

Claimants' counsel then read the deposition of HENRY LARSEN, also taken before a notary public, through an interpreter, on June 30th, 1887, to the effect that he was boatswain of the Holberg; that he assisted at getting the anchor up after leaving the dock with the carpenter, and when by the fort, down near quarantine station, was ordered up on the foremast, where he remained on the gaff, about 30 feet above the deck, until just before the collision; that the fog had just commenced when near quarantine station and shut in after they had passed the fort on Staten island. He could not see the fort plain; couldn't say how far abaft abeam it was when the fog shut down; didn't take the bearings; couldn't see any land after he got up aloft; was looking ahead after got into the fog; first saw tugboat about 30 or 40 fathoms off right ahead a little on the starboard side; next saw towing hawser and afterwards the bark. When he heard the tug's whistle first it came from right ahead.

Claimants' counsel then read the deposition of RASMUS EIDE, also taken through an interpreter by claimants before a notary public June 30th, 1887, who testified:

I am chief engineer on the Ludvig Holberg; have been 17 years an engineer on steamers. After leaving New York on the day of the collision and after we got straightened down the river we made

full speed for awhile; the engine at full pressure makes between 69 and 71 revolutions a minute. The next order received
50 in the engine-room was half speed; when the engine is set half speed it makes between 45 and 50 revolutions a minute. After that order came, "Slow;" the engine, when we have an order to slow, makes 20 up to 25 or 26 revolutions a minute. I cannot tell how long they were going slow, I had no watch at hand, but about a quarter of an hour; I got an order: Stop and full speed astern; perhaps those two orders were a third or a half a minute apart; I had the engine going back about half a minute, when I felt the jar of the collision. I can get more revolutions at full speed astern when the ship has a little headway, as she had then, than ahead. I had the very highest pressure on. Her engines are high and low pressure—compound engines; eighty pounds of steam is the highest pressure allowed; we were carrying at the time of the collision eighty-three or eighty-four—the highest to the collision. The second engineer attended to the telegraph; I worked the engines; the clock in the engine room did not go; the propeller is right-handed.

Claimants' counsel then read the deposition of ANDERZ BERG, also examined before a notary public, through an interpreter, to the effect that he was second engineer of the Ludvig Holberg and had charge of her telegraph in the engine-room; that before the collision the engine was going half speed—ten or twelve minutes; after that went slow, about 15 or 16 minutes; then the signal stop, full speed astern, followed, the two being given on the dial at once. The engine worked astern one minute before the collision; neither the first nor second engineer looked at any watch or clock; the engine made 71 revolutions under full speed; 40 to 45 under half speed, and between 20 and 25 under slow; the pitch of the screw is 14 feet 2 inches.

51 Claimants' counsel then read the deposition of KNUD KNUDSON, also taken before a notary public, through an interpreter, on June 30, 1887, to the effect that he was a fireman on the Ludvig Holberg, and was in the engine-room at the time he felt the jar of the collision; that about ten or fifteen minutes before that he came into the engine-room from the stokehole; as he was coming in there from between the boilers he had heard the telegraph ring, and when he came in the engines were going slow—the engines were going slow from 10 to 15 minutes before the collision; then they were stopped, and just as soon as possible were going full speed astern; they were going astern about a minute before the collision. Before he came in the engine-room they were going half slow. He did not carry a watch, and the clock was not running.

Claimants' counsel then read the deposition of THOMAS BRODEHN, also taken before a notary public, through an interpreter, to the effect that he was a steward on the Ludvig Holberg; was out on the starboard side of the deck before the collision; that while there

he could only see about half the length of the vessel; he heard a whistle and saw the tugboat at the same time; that it was then between one and two ship lengths off, and that the weather was then the same as before—a thick fog; that he heard the tug blow one whistle and then two whistles in succession; he did not see the bark till soon afterwards, when it was reported that the tug had a bark in tow.

Claimants' counsel then read the deposition of GEORGE ASMUNDSEN, also examined before a notary public through an interpreter, who testified:

I was the man at the wheel of the Holberg at the time of the collision in May last; I was not at the wheel all the time
52 from the time we started from New York; I went to the wheel a little after we started.

Q. Where was it that you relieved the other man at the wheel?

A. It was before we arrived at the quarantine station. From the time I took the wheel I kept it up to the time of the collision. The wheel is near the bridge—the after part of the bridge. The pilot and the captain were on the bridge before the collision. The weather at the time I first took the wheel was clear. It was clear up to the time we got between quarantine station and Staten island. When we arrived between quarantine station and Staten island we got thick fog—dense fog.

Q. What do you mean by quarantine station?

A. There is a church and steeple, as well as ships, and the doctor comes on board. When the fog came on I was ordered by the pilot to keep south half west. They kept blowing whistles frequently; they do that during a fog. The captain and the pilot both blew it. The first thing I noticed after the fog came on was a tugboat coming up against us in an opposite direction. This was about 20 minutes or so after the fog first came on. The tug was a little upon our starboard side—a half a point on the starboard side—a couple of ship's lengths, about, away. An order was given to me after the tugboat was seen. The pilot ordered us to starboard the helm. I obeyed that. Just before he gave the order to starboard the helm was about amidships. The next I saw was the bark. That was after I starboarded our wheel I saw the bark. It was about a minute or so after I first saw the tugboat. After the bark was seen the pilot ordered the helm hard-a-port, and the captain came up and helped me to put it hard-a-port. Shortly before he had telegraphed to the engine to slow—long before that. When we saw that a collision was inevitable he signalled to stop and full speed astern. The steamer, under the first starboard helm, before the second order changed her course about a point. The bark
53 when I first saw her bore on the port bow. At that time our course by the compass would be south half west, and at one point it would be south half east. I could see the port bow of the bark. When I first saw the bark she was a good ship's length away.

I saw the bark at the time they sung out the steamer had a bark in tow. I could not see the hawser; it was too thick and foggy. I did not notice how much we swung under the hard-a-port helm before the collision.

Being cross-examined, he further testified:

I am nineteen to twenty years old; I am not an able seaman; I am an ordinary seaman. I was steering by compass south one-half west at the time I received the order to starboard. I changed on the starboard helm a point.

Q. Were you on the swing to starboard when you got the order to port?

The witness indicated that he did not understand the question.

Q. Were you under the starboard helm at the time you got the order to port?

A. Yes; under the starboard helm; then I starboarded south half west a point. At the time I saw the bark my helm was about amidships. Our heading by compass at that time was south half west. I have followed the sea two years. Four or five turns of the wheel will put it hard over. When I first saw the bark the helm was a little afore than amidships. I had given her the starboard helm, and after she had swung a point under the starboard helm, then I got an order to put it hard-a-port, and I did so, and the captain assisted me. I saw the bark as soon as the mate sung out, "He has a bark in tow," and then the pilot ordered hard-a-port. Where I have given the directions that the steamer was going they were the directions by compass and accurate.

Claimants' counsel then read the deposition of JACOB ERICKSEN, also examined before a notary public, through an interpreter,
54 to the effect that he was a seaman on the Ludvig Holberg, and before the collision went aloft on the foremast at the same time with the boatswain; that the weather was clear for a little while when he first went up, but it soon came thick, and the steamer when he went aloft was between the fort and quarantine station, but fog came on; heard a whistle and saw a passenger boat pass the Holberg on the starboard side; saw that steamer as soon as fog set in; she was a good ways off; did not see anything after that nor see any land. Afterwards heard one whistle, and shortly afterwards saw the tugboat; right afterwards saw the rigging and spars of the bark, and then was ordered down, as there was going to be a collision. At the time he saw the tug he heard her blow two whistles. The steamer answered with her whistle, but he could not say what signals; that the collision happened about half an hour after he went aloft.

Claimants' counsel then read the deposition of FREDERICK SUCKOW, also taken before a notary public through an interpreter, examined by claimants, who testified:

I am an able seaman on the Ludvig Holberg. On May 24th I

was on deck. After leaving the dock I had the wheel. I was relieved of the wheel by Asmundsen and I went forward. The weather when I left the wheel was commencing to be thick; it was getting thicker and thicker as we advanced down the bay. There were then two men by the anchor close to the bow, and the carpenter standing in front of them, looking out. I saw the first fort. That fort was a little bit below Atlantic dock. I saw the tugboat first. It was a couple of ship's lengths off.

Claimants' counsel then read the deposition of GEORGE F. BUSCH, examined by claimants on July 23, 1887, before a notary public, who testified:

I am master of the steamship Ludvig Holberg. I was captain of the vessel at the time of the collision in May last. It was slack tide. It commenced to be foggy between Staten island and
55 quarantine station, the place where the doctor comes on board when ships come in. It was about abreast of that. The weather then commenced foggy. The weather when it first began was not so thick. We could see three or four ship's lengths off when it commenced. Then I gave them half speed by telegraph. Before then it was full speed. About ten minutes after then it came dense fog. We couldn't see anything. Then I gave by the telegraph at the bridge to the engine "slow." When I telegraphed slow I couldn't tell where the ship was, because I couldn't see anything. After we left quarantine station we couldn't see anything. I did not see either of those forts as I passed as I went out. The order to slow was obeyed at the engine-room. There is an answer by the telegraph from the engine room. When I order them to go half speed, then they give an answer. It is called a repeating telegraph. At the time I slowed the engine I ordered the mate to keep a good lookout. The mate sent the carpenter on to the forecastle, and both mates stood forward there. The carpenter was close to the stem and the mates four or five feet from the bow. Under that order to slow she was going about three knots. At full speed she goes eight and a half or nine knots—nine knots generally. She goes between six and a half and seven knots at half speed. As we were going down slow I didn't pass any vessel or steamer before I saw the tug. I heard some whistles on the port bow—on the port side first. I could not judge how near they were. We kept our whistle going all the time; one blast every half minute to a minute. The first I heard of this tug was one blast of a whistle. I couldn't see the tug then. The blast came from forward—right ahead of us. Next was one blast again. I did not see it the second blast. The second blast was a little more on the starboard bow. Then we saw the tugboat. The tug
56 when I saw it, I should think, was about two ship's lengths off—four hundred feet. She gave two blasts. I gave two blasts, too, and the pilot gave the order to put the helm a-starboard. I saw the wheel was put hard-a-starboard, the steamer swinging under the starboard helm, I think, about a point, so far as I can judge from the tug-

boat—judging by the tugboat. I could not see any other vessel astern of the tugboat or ahead of us at that time. The weather then was dense fog. The pilot gave the order after the wheel was starboarded to steady the wheel again. Then both the mates sung out from forward that the tugboat had a ship in his tow. I saw it then. We first saw the middle of the rigging. I should think it was about a ship's length off, just about that—about two hundred feet—something like a hundred and ninety-two feet. We could see the port side of the bark. She was on my port bow by about one and one-half up to two points. The Holberg was heading, I should think, about south half east. That was after we had starboarded the helm; before we saw the bark it was steadied. The first thing I did when I saw the bark was to put the helm a-port and gave one blast at the same time. The pilot did that, of course. I assisted to put the helm a-port, and I telegraphed the engine to stop and got an answer from the engine; then I telegraphed full speed astern. As soon as we saw the bark, before we stopped the engine, we sung out to both the tugboat and the bark to let go the hawser. The hawser was not slacked at all before the collision. It was taut. When I first saw the bark the tugboat was bearing about five or six points on my starboard bow. The tugboat's course was, I should say, about northwest. I judge the bark's course to be about north-northeast; northeast half east, I think would be right. If there had been no towing hawser I do not think there would have been any collision. I did not see the steamer strike the towing hawser.

57 I saw it part; it shoved our bow over to port. I believe at that time our vessel was quite still; that there was no headway on the Holberg then. The engine was working full speed astern then. I could see the deck of the bark as I came up to it. I saw the pilot and wheelsman on the poop, the captain just coming out. Before I saw no one forward on her.

Q. When the Holberg was going, as she was then, slow, and you give the order, "Stop, full speed astern," in what distance can you stop her?

A. I think in about 150 feet—inside of her length. I was on the bridge when the vessels came together (the word "angle" being interpreted). The angle of the collision was about three points. After the collision we were going slow in the fog about two or three minutes or so. After we got clear then we got aground. After the collision, when we got clear, it cleared off a little, and we could see two or three ship's lengths off. Then we saw a buoy, and the pilot says to me, That is No. 11 buoy. That buoy was off from where the collision happened three or four lengths, I think. From the time I put the steamer slow up to the time of the collision the fog had been dense fog. You could see any object about a ship's length off, no more. The time of the collision was about 25 minutes past four. I looked at my watch then, as soon as we were free from the bark, about one minute after the collision. The tugboat came up to us after we were aground after the collision. If we had not ported our wheel when we first saw the bark she would have struck us. If the bark had not been pulled to the westward by the tugboat I think

we would have gone between, clearing the bark's port side. I have made experiments with our steamer to see how quickly she could be started. Supposing she was going three knots an hour, she would stop dead in the water in about half a minute, I should
58 think—stopping and going full speed astern. Then she is quite dead, I am sure. I swung after I saw the bark and before I struck the hawser, I should think, about a point and a half. I suppose it was about a minute after I saw the bark and before the collision took place, half a minute—half a minute before it took place after seeing it. The pilot gave all the orders. He gave the order to half speed when down off quarantine station.

Q. You were directly off quarantine station, then?

A. Yes; right abreast of quarantine station. Before that time I did not see any vessels going down the same way as we were going. I did not hear the whistle of any vessel ahead of me after the fog commenced and before I heard the tug's whistle, but I heard some on my port side. When I first saw the tug we were going south half west and he was going about north, I should say parallel. When I first heard the tug's whistle I did not do anything on my steamer, only gave one blast, one blast again, and we kept the whistle going; that was a fog signal. After I saw the tug he gave two blasts and put his helm to starboard, I cannot say how much, but I should think about a point to the starboard. He gave two blasts. We answered his two blasts and he shifted the helm to starboard at the same time; the tug's movement was first. The tug was then about, I should think, about two ship's lengths off—four hundred feet off, not more than that—four hundred feet from our bow. After the tug had made her change of course and I had made our change of course she was keeping all the time over to the starboard. I think at the time we saw the bark he was about five or six points on my starboard bow.

Q. How near did the tug get to the steamer before the collision?

A. I think about 30 fathoms that we were from the tugboat; that was the time we were nearest to the tugboat. When we first saw the bark I should think the bark was about a ship's length off; not quite a ship's length. I cannot say exactly, but I think about a ship's length off. At the time when the bark was a ship's length off I did not think a collision was going to happen, because
59 we sung out to the tugboat and the bark to let go the hawser. My opinion is, if they had let go we would have gone clear between the tug and the bark—between the tug and the bow of the bark. I think there was time enough to do that and so save a collision. The bark was going ahead at the time, I should think, about six knots, and we were going about three knots—slow; for about 15 or 20 minutes going slow. That would make the two vessels come together at the rate of about nine knots—that is, nine hundred feet a minute; the only thing that could save it was throwing off the hawser. If the bark had been keeping after the tug-boat of course we could have cleared her. I saw the compass; we were steering by it in the thick fog. Our course was south half west about the time we saw the tugboat. After we had put the helm

a starboard for the tugboat and steadied the wheel again, then we headed about south half east. From the first to the second whistle of the tugboat it was about half a minute. Directly after I heard the second whistle I saw the tug. I cannot say how long the whistles were that I had been blowing. I think each blast would be about twenty seconds long. When I heard the tug's whistles the first time I thought it was a fog signal that they were blowing, of course, and I thought it was a big boat, and that was what I thought the second time.

Q. Why did you not stop when you heard a whistle exactly ahead or about ahead of you; why didn't you stop when you heard a whistle almost ahead of you?

A. I didn't think I ought to do it; we had to go clear, I thought.

Q. You did not think you ought to have stopped?

A. No; I didn't think so.

Q. You could have stopped as well as not if you'd wanted to?

A. Yes; of course we could have stopped, but as long as I was going ahead slow I thought it was all right; you could not

60 see a ship's length off, but if there had been no bark behind we could have gone clear of it. Of course, I was clear of the tugboat which blew the whistles—which blew both—gave two blasts—were clear all right with the tugboat, which had the hawser on the other boat. When I first saw the tug she bore about half a point on my starboard bow. After we put our helm to starboard for the tugboat and swung on that, then we steadied the helm again. Then we saw the bark. Then the pilot sung out to put the helm to port; he gave one blast at the same time, and I helped to put the helm hard-a-port. It was not changed after that again. Under this hard-a-port helm, which the pilot ordered, I cannot say exactly how much she did swing, but I think about a point—a little more than a point. Of course, when a ship is going full speed astern her bow is going to starboard. It was a right-handed propeller.

Q. If when you first saw the bark she was on your port bow, then afterwards you swung to starboard, why didn't you clear her?

A. We stopped too early—I cannot say that—we stopped the engine too early; didn't swing enough. If we had kept our helm a-starboard, then the bark would have hit us about amidships. If we had kept the helm steady, then the bark would have struck us about amidships on the starboard side; she was still swinging under the starboard helm after I had steadied the wheel. When I first saw the bark I saw only her bow; it was the bark's bow that was on my port bow. From the time I first saw the bark up to the time of the collision we swung to starboard a point or a point and a half.

Claimants' counsel then read the deposition of GEORGE W. WARREN, taken March 10th, 1888, for claimants, who testified:

I was captain of the steamboat St. Johns in May, 1887. She runs from pier No. 8, North river, to Sandy Hook, in connection with trains

of the New Jersey Central railroad. I keep a memorandum
61 of each trip to and from the pier. I left our pier here on that day at 3.46. At the time of starting the wind was south-southeast, the weather thick, but not dense fog then. When we got down by Bay Ridge we ran into a thick fog. Before it became thick I should think we were running 17 or 18 miles an hour, as nearly as I can judge. When we reached Bay Ridge it was not two minutes past four. Our ordinary running time from the pier to the Narrows is from twenty-five to twenty-eight minutes, owing to the tide. From the time I struck the dense fog spoken of I ran in dense fog till we crossed buoy 11, at the tail of the bank. When we passed buoy No. 11 it was dense fog. We came into fog that was not so thick, I should judge, about three minutes after we passed below buoy 11. We were blowing our whistles. When we were down just below Craven shoal or about Craven Shoals buoy I heard a steamboat whistle directly ahead of us, and we slowed our boat right down as quick as we could shut her off. We were running close shut down. We did not stop; we were running not to exceed five miles an hour, and we passed a steamboat—a tramp steamship. I should judge it was about abreast of buoy 13 or probably a little below that. She was going the same way we were heading, on the same course out of New York. We passed her on the starboard side, just nicely clear of her. I didn't take notice of her name; I couldn't have read it if I had tried to. I could just see it was a steamship. We were going rather faster than she was. I should judge they were running as close as they could down slow. After passing her I heard whistles astern of me. After I passed the tramp steamer I hooked our boat up. We run on schedule time, and when we don't have a fog we generally run—if we don't hear anything we keep going. After I had hooked on again and when right off buoy 11 I heard another whistle directly ahead and closed our boat down. The
62 dense fog broke away—still it was foggy—and we could see quite a distance. Just as we got slowed down there was a tugboat and bark. I passed that tugboat and bark to the westward of her, just cleverly clear of her; we sheered a little to the westward on that same side of her. Our time of arriving at Sandy Hook was five o'clock, and some time between 6 and 7 I passed the west bank coming back. I saw the bark; she was lying there just by the channel. We almost ran right on top of her spars, when we saw her. She lay just a short distance below buoy 11. She lies a little west of a line, I should judge, bearing south by west from buoy 11; just off the bearing of a south by west course. From the time I passed this tramp steamer to the time I met the tugboat and bark there was no time I could see Long Island shore or objects a long distance off. I remember this day particularly, because as we had unfortunately struck another boat the day before some imagined that it was the St. Johns that did this business, as at first it was not known which vessel had sunk the bark. I am able to fix the time within half a minute when I was opposite Bay Ridge simply by running the course six times a day. You can blindfold me when she leaves pier 8 and I can tell within 20 seconds where she

is all the time. The schedule time for leaving pier 8 was 3.45. I struck the dense fog at Bay Ridge and buoy No. 18. I did not slow there, not at that time. I first slowed when we first heard the steamer's whistle at Craven shoals. I got to Craven shoals not later than 4.16; then it was dense fog. The tramp steamer, when I first saw her, was not over a hundred yards off, nearly right abreast. I first saw the after part. I slowed down immediately to about four knots an hour. That shutting down reduced our speed to four knots an hour in one minute, so that when I got abreast of her my speed through the water was four or five miles. The
63 St. Johns is a paddle-wheeler. I didn't reverse at all. We did not come nearer to her than a hundred yards. When I hooked on for full speed again I was right abreast of her. I was slowed down not to exceed a minute. After I had hooked up again to get to going full speed again did not exceed half a minute, and I continued at full speed down to the time of hearing the tug's whistle—the regular fog whistle, one blast. The tug, when I first sighted her, I should judge was not more than one hundred and fifty yards from us, bearing nearly right ahead. We slowed down when we heard her fog whistle blow the second or third time—slowed down just before we discovered her in the fog. I passed on the tug's port side—port to port. The bark was right astern of the tug. The bark had no sails on. I passed her, I think, a hundred feet to the westward of her. I cannot tell our speed then. We slowed down when we heard the whistle and then hooked on again when abreast of her. We got in the dense part of the fog in the Narrows; that is where it is thickest generally, and it was then, from the Narrows to just below buoy No. 11—in the Narrows and outside, both—and between there and Bay Ridge—as far up as Bay Ridge. The hours and minutes which I have given are not from my memorandum; I am giving the time I know it takes to reach any given point from any other. I know the time we arrive at Sandy Hook and the time we left New York and the time we arrived at New York again, and I would know when we would reach the different buoys, and I know it takes so much time to run it. (Book produced by witness.) It is all in my handwriting.

The following is a copy:

St. Johns, Tuesday, *May* 24.

Leave—		Arrive—		Time.	
N. Y....	4.33	S. H....	5.45	1.12	
A. H....	7.52	S. H....	8.05	13	
S. H....	8.16	N. Y....	9.18	1.02	Throughout the day strong.
64					
N. Y....	10.16	S. H....	11.26	1.10	S. S. E. winds, p. m., attended with fog.
A. H....	11.59	S. H....	12.12	13	
S. H....	12.17	N. Y....	1.29	1.13	
N. Y....	3.46	S. H....	5.00	1.14	
A. H....	5.42	S. H....	5.55	13	
S. H....	6.01	N. Y....	7.10	1.09	

A. H. means Atlantic highlands, N. Y. means New York, and S. H. is for Sandy Hook. The figures under those headings mean the hour of leaving. Under the last column the figures refer to the time consumed on the trip. The first means that the trip occupied one hour and twelve minutes. The last two figures in the first two columns mean the number of minutes after the hour, the preceding figures meaning the hour. By leaving I mean when we actually let go the dock. After we let go we get under headway. Usually in three or four minutes we have to stop after we get out. Taking the average time from the time we cast off till we get under way, it does not take over a minute and a half. We take our time from the time we let go to the time we run the line out at the other dock.

Being examined by libellant, on appeal to the circuit court, before a United States commissioner on October 19th, 1889, he further testified:

We carried the ebb tide on our 3.46 p. m. trip out through the Narrows, if I remember right—I think we did—and lost it about Craven Shoal buoy. I said when we got to Bay Ridge buoy it was not two minutes past four, by the time it takes us to run from pier 8 to Bay Ridge buoy, about 16 minutes. I meant it was less than two minutes; somewhere between one and two minutes past four.

Q. Will you please look at the chart and measure the distance from buoy 18 to abreast of Fort Lafayette?

A. (Looking at chart.) Two nautical miles takes you a little below the fort bell over the course the steamer usually runs. She was not running any slower between the Bay Ridge buoy and the
65 Fort Lafayette fog bell than she was between pier 8, North river, and Bay Ridge buoy. In nautical miles from pier 8, North river, to Bay Ridge buoy (measures on chart) appears about four and three-eight-s miles, scant; about that. I was not running any slower between Fort Lafayette and Craven's shoals. The distance between those two points (measures on chart) is about one and five-sixteenths miles. I got to Craven shoals not later than 4.16, and in figuring up to make that 4.16 I have allowed for running from pier 8 to Bay Ridge buoy sixteen minutes, and from Bay Ridge buoy to Fort Lafayette bell nine minutes, and from Fort Lafayette bell to Craven shoals five minutes. We pass either side of Craven shoals. The buoy I saw next after passing Craven's shoals was buoy No. 13. I passed on the east side of it. Next after that I saw buoy No. 11 and passed it on the east side. I can't answer how far off; just nicely clear of it. It was a length, more or less. I can't tell that now; it has been too long since. The St. Johns is 250 feet long on the keel. After passing buoy 11 we headed for buoy No. 12, on the east side of the main ship channel, below the swash channel. I steered for that buoy by compass, about a south-by-west course. I passed the tramp steamer to the westward of her, on the starboard side, very close to her; I should say not over a ship's length off.

Q. Do you remember how far you had passed buoy No. 11 when you ran into a place where the fog was not so thick?

A. About three minutes after we passed buoy No. 11. I can't tell the exact distance. When I said I could see quite a distance I meant far enough to clear vessels without danger; probably a quarter of a mile. I passed a tug with a bark in tow just below buoy 11. We ran out of the dense fog when we were right abreast of the tow. That lighting up of the fog continued not to exceed two or three minutes. After that there was at times dense fog, and at times light streaks through it. I did not see buoy No. 8
66 as I went down. On the return trip from Sandy Hook to New York, leaving Sandy Hook at 6.01, I arrived in New York at 7.10, making the trip in an hour and nine minutes. On the return trip we had fog until we had passed between or above the tail of the bank, buoy 11, as dense as it had been before. The tide on that return trip was flood tide. I left Sandy Hook in the morning at 8.16, arriving at New York at 9.18, making the trip in an hour and two minutes. It was then flood tide.

Claimants' counsel then read the deposition of GIDEON MAYES, examined before a notary public on March 10th, 1888, who testified:

I am a Sandy Hook pilot and have been since the year 1853. I was the pilot of the Ludvig Holberg in May of last year. At first starting it was very fine. We struck a thick fog in the Narrows, just below lower quarantine, at Clifton, Staten Island. I was on the bridge of the steamer from the time of leaving the pier until the time of the collision. The captain was there with me. The wheel was abaft of the bridge. After we struck the fog we slowed down half speed.

Q. Abreast of what point were you, about, when you slowed her to half speed?

A. Craven's shoals.

Q. After that did you give any further orders to the engine?

A. Well, it was very thick and we went very slow. The captain worked the indicator to the engine-room. I just looked out for the ship ahead. There were men forward, right on the bow; there was a whistle blown all the time—two or two and a half minutes apart. At the time we reached Craven's shoals it was very thick. I did not see any vessel passing. The steamer was running before we got into the fog, I should judge, about eight and a half or nine knots an hour.

Q. About how fast was she going when you said the fog being dense you let her go slow?

A. I don't suppose over three miles an hour. I know she
67 was going very slow. We went right down on the west side of the channel; we went close to the elbow of the bank so as to clear the buoy. The elbow of the bank is buoy No. 13. When about half way to the elbow of the bank—that is, buoy No. 13—I heard the fog whistle sounded on Sandy Hook. The first we heard

of this tugboat was the whistle, and we didn't know exactly where it was; we did not know which bow it was on; we couldn't see anything of it then. The fog was very thick. The next thing we saw was the steam-tug. She was a little south by west, about south—nearly ahead of us—about not more than half a point, I should think, on the starboard bow. The course I was steering in the fog was about south half west. When I saw this tugboat half a point on our starboard bow I couldn't see the vessel she had astern of her at all. She was not over a hundred feet from the bow of the steamer. The tug after she came in sight blew two whistles. We blew two whistles, too, and I gave an order to the man at the wheel to starboard and he did it.

Q. How much did it swing the vessel?

A. It did not but a little before I saw the bark. Her bow bore from us about south-southeast, pretty nearly ahead. She could not have been over a hundred feet away, because she seemed to head right across our bow. She was not over a hundred feet from the bridge then—I mean the bark. On seeing the bark I ported the helm and stopped the ship; it was all done pretty quick. All the time the bark was coming very fast. The captain was working the indicator then. The next orders I gave were to stop her and back at full speed. I told the man to port the wheel. I had the whistle going all the time. When I was on top of the vessel of course I could not. I am not sure whether or not there was any whistle blown after I saw the bark. I saw the steamer strike the hawser. I could not judge whether
or not the engine, reversing it, had had any effect on
68 the steamer's headway. I am not sure whether it did or not.
The porting of the helm swung the steamer a little before the collision. If we had not ported our helm we should have struck the bark amid-ship. We sung out to the tug to cut the hawser. I noticed the hawser was taut before we struck it. The direction of the tug from us just before the collision must have been about south-southwest from me—right across our bow. I was headed about south half west and she was right across our bow. Her course about that time, I should say, would be about north by east half east. The course of the bark was N. E. ½ N. The tug had starboarded her helm and the bark had ported hers. I first saw the bark's port side and rigging. After the collision the steamer went right to the westward—headed westward. I cast the lead after the collision. It was done about two or three lengths off from the place of collision. I found the depth of water to be about 13 feet. We drew about 12. We were then near buoy No. 11. The place of this collision was just south of buoy 11, at the tail of the bank. We were going close down along the bank on the right side of the channel. If we had seen the bark when we first saw the tug I would have ported my helm and gone to the right. If I had heard three whistles when I first saw the tug I should have understood that she had something in tow; that has long been the towing fog signal. When I first saw the tug the Holberg was not going over three knots—going very slow, indeed. Before going into the thick fog I saw some Old Dominion steamers going down ahead. I think there was one or two;

I don't know which it was. After I passed the Narrows I don't remember seeing any then—I mean after passing Fort Lafayette. We crossed over at quarantine and went down on the west side of the Narrows and continued on the same side all the way down
69 from the Narrows. I don't remember any side-wheel boats passing us before we reached Clifton, or off there. Moving over from the East river into the North river we went about half speed. In the North river we hooked up full speed.

Q. Can you give us any idea how long, in your judgment, it was from the time you first signalled the engine to back out of the dock down to the time you were abreast of Bedloe's island?

A. No, sir.

Q. Can you give us an estimate?

A. I suppose it was half past three. I suppose it had taken 30 minutes after the first signal to the engine at the dock.

Q. Where was the Holberg when the first signals were given on account of any fog?

A. She was in the Narrows, on the Staten Island side, north of Fort Lafayette. I cannot say how much to the north of a line drawn from Fort Lafayette to Fort Wadsworth; I don't think over half a mile; about half a mile, I think. The first order that was given with reference to the fog on that steamer was half speed.

Q. And was that given at the time when, as you say, you were half a mile to the north of a line drawn from Fort Lafayette to Fort Wadsworth?

A. It might have been a little below that.

Q. How far to the north of that line drawn from Fort Lafayette to Fort Wadsworth was the half-speed order given?

A. I cannot say.

Q. Half a mile?

A. Not over a quarter of a mile. Down to that time the vessel had been going full speed—that is, from Bedloe's island. The Holberg ran under that half-speed bell, before any change was made in her engine, nearly an hour; perhaps a little over.

Mr. PUTNAM: Do you mean that?

Q. Is there any change you want to make in your answer to that question?

A. No; when the Holberg was running under this half-speed bell from a quarter of a mile north of a line drawn from those two forts her speed was about six knots through the water. While she was running under half speed fog signals were being blown on her—all the time. We commenced to blow fog signals right in
70 the Narrows and after that order to go half speed; not over a minute or two minutes after. I couldn't see Fort Lafayette when passing it, nor Fort Wadsworth. I did not see them unless before the fog set in. Then I was away above, of course. The nearest we got to Fort Wadsworth, when I last saw it, was about a half of a quarter of a mile. I heard the bell on Fort Lafayette. The next order to the engine after the first order, half speed, was "Slow," quite slow. I communicated that to the captain in English.

He spoke English. The words on the indicator which communicated the orders to the engine were, I think, in Norwegian. I do not understand Norwegian. When I gave the order "Slow, quite slow," the captain touched the indicator. I saw the difference in speed after that. I noticed it was slower. Down to that time I had not heard the fog whistles of any other vessels, either meeting or going past us, that I remember of.

Q. How long after you gave the order to slow—to go quite slow—was it that you heard the first fog whistle that you can remember?

A. That was the time I heard the tugboat's. I could not say how long it was.

Q. What was the first you heard of the tugboat?

A. That whistle was the first I heard of it.

Q. Then you heard no fog whistles blown on the tugboat?

A. No; I didn't hear any blown on her.

Q. If they had blown one would you have heard it?

A. I think so; the wind was toward me. I suppose I could have heard the whistle from the tugboat about a mile and a half or two miles; I cannot say exactly. If it had been sounded before I caught sight of her I could have heard it far enough to have avoided the collision.

Q. When you first heard the whistle did you take that to be a signal from the tugboat, or did you take it to be a fog whistle?

71 A. I took it to be a signal from the tug. When I heard the two whistles from the tugboat I saw her right away. I answered right away myself. When I gave the order to slow she didn't commence blowing off any. She hadn't been blowing off at all. I cannot say exactly how long she had been going slow. She was going dead slow before I heard the tug's two whistles. When the tug was within a hundred feet of me the most she ever bore from our starboard bow was about south-southwest, I should say. That would be about two points on the starboard bow. The bark just began to come out. Then I told them to cut the hawser when she was right under our bow—right close to us—within thirty feet of us—within thirty feet of the tugboat. When the tugboat came up I could see the whole length of her, when she starboarded and crossed our bow. I mean to say that the tugboat actually crossed our bow—the whole of her crossed our bow. At the time the tugboat crossed our bow the steamer was stopped and going astern. In my judgment, the steamer struck the towing hawser 30 or 40 feet from the bark's bow. The hawser was then taut. When that hawser was struck the tug was on the starboard bow south-southwest from us, I should judge—bearing off the line of the steamer, heading about west-northwest. She was heading four or five points off from the line of the steamer. The bow of the tugboat was forward of the steamship's amidships—forward of the bridge. I gave the order to stop and reverse when I saw the hawser; not before. We were not over 25 feet from the hawser when I first saw it. I didn't give any order or hail to the tug or bark to cast off the hawser until I had seen it. I didn't know she had a hawser till I saw it. I didn't know there was a bark before that. I saw a

buoy just as we passed the tail of the bank just on the starboard side. It must have been forty feet from us, I should judge. That was the only buoy I saw. I could see Fort Lafayette before the fog set in. I went down as far as Craven's shoals, then hauled down south half west, and kept about that
72 course from that time until I saw the tugboat. The west side of the channel takes about that course—pretty nearly south. I consulted no watch this time going down. I don't always have one. The statements as to periods of time going down is a mere guess made long afterwards, so with the statement that we run an hour half speed. The exact point at which I gave the captain orders to slow—to change from half speed to slow—was somewhere between buoy 11 and 13. The fog before that was very thick. The first whistles that I heard from the tugboat were the two that I heard when she came in sight—when he was right close to me. Before that I had heard whistles in that direction; I didn't know from what it was; that was before the tug came in sight. At the time when I first saw the bark I could not by putting the wheel hard-a-starboard have cleared the bark in the same way that I cleared the tug; there was no time. I saw the hawser before the bark; next I saw the bark's port bow. Then the keel of our vessel was pointing about amidships of the bark. The Holberg had no sails on. The first change of course I made as I was going through the Narrows was going down from south to south half west; that must have been about Craven's shoals; I don't know. I was going on judgment merely. The first buoy I saw was buoy 13. I could not see the shore—how close I was to Craven's shoals.

The witness was examined by the libellant before a United States commissioner on appeal to the circuit court on November 30th, 1889, and testified:

Eight bells on ship is twelve o'clock and four o'clock. On seagoing vessels watches are changed at twelve o'clock and at four o'clock. I do not know if there were any change of watches on the Holberg. The Holberg went out to sea after the collision by the swash channel. I intended taking her out to sea before the collision by the swash channel. She did not go out to sea. She anchored in the swash, about half way down, on the west
73 side of the channel. The Holberg passed forty feet off buoy No. 13, to the eastward of it.

Q. What is your present recollection of the speed of the Holberg from the time she left her dock down to the time she was off South ferry?

A. I think about three and a half knots an hour through the water; I don't exactly remember now; about three or three and a half knots; not more than that. We went slow until clear of vessels in the East river. I suppose the tide in the East river when running half ebb is about a knot and a half. We carried the ebb tide with us to the tail of the bank.

Q. Did that ebb tide diminish in strength as you approached the Narrows?

A. Well, not a great deal. Of course it did a little going from the Narrows to Craven's shoals.

Counsel for both parties conceded on the trial that the tramp steamer spoken of by Captain Warren, which was passed by the St. Johns a little below buoy No. 13, was the Ludvig Holberg.

Claimants' counsel then read from the apostles the deposition of SEVERIN AXELSEN, taken before a notary public July 6, 1887, to the effect that he was the master of the Norwegian bark Aristos, which arrived at Sandy Hook on the afternoon of this collision; that he took a tugboat to be towed up to New York from about 8 miles out from Sandy Hook lightship; that before he took his tug he noticed a bark take a tug to be towed up, which started about half an hour ahead of the Aristos; that the weather as he went on came on thick, and that the tug towing the Aristos blew three blasts of her whistle often; that he was directed by his pilot to keep his fog-horn in readiness to be blown to any sailing vessel, but not to a steam vessel; did not blow it; that at 4.30 p. m. he passed the same bark after the collision on the left of the Aristos; that the bark was sinking; the water was right over her
74 deck; that he saw some of the crew up in the rigging and on the forecastle and the tug alongside on the starboard side; that he could not see the steamer then; he saw her before when it was a little clearer; he did not take any notice how far off from the bark the steamer was; about a cable length off, he thought; he was then about half a mile away.

Claimants' counsel then read the deposition of CARL OLSEN, mate, and HANS OLSEN, sailmaker, of the Aristos, taken at the same time before a notary public, who gave evidence which tended to confirm the deposition of said Axelsen.

Claimants' counsel then read the deposition of HENRY C. JOHNSON, taken before a notary public March 20, 1888, to the effect that he was a Sandy Hook pilot, and as such brought in the bark Aristos on May 24, 1887. Before the Aristos was taken in tow he noticed another bark near, which he saw taken in tow by the tug Leonard Richards; that the Aristos followed also in tow on a hawser 70 fathoms long; that the weather came on thick fog, and three blasts were regularly blown by the tug towing the Aristos, and that the fog-horn on the bark was ordered to be kept ready to be used as ordered by the pilot. The weather was thick coming up to buoy No. 8, when it kind of scaled up; that he could then see a mile off at about No. 11, all the upper yards of the other bark quite plain, but not the hull; that he saw a steamer that was in to the westward of the bark quite a distance off, which he took for a small Norwegian fruiter; one was outside of the channel and the other in to the westward in the shallow water, the bark in the channel and the steamer in to the westward; that they could only be seen for an instant, five minutes, and then the fog shut down thick again; that

75 the witness then supposed the bark was at anchor; that he could not quite tell how close the bark was to buoy 11; he was too far off to judge. After that they saw no more until they passed right astern of the bark, which was then heading in shore on their port side. The Aristos passed close to her stern, about 15 feet off. The Aristos passed her in the centre of the channel and was drawing 17½ feet; that they could see where the bark had been cut—could see her stern hanging off. A tugboat was then hanging close alongside and some men were seen forward on the bark, which was not moving at the time; that he saw buoy No. 11, as he got close to this bark and when abreast of the bark buoy No. 11 bore northwest from the Aristos; that the bark was then hardly her length from buoy No. 11 and was heading to the westward right across the channel, pointing to the west bank, heading about west; that he could just see the steamer's mast and funnel to the southward and westward of the bark and bearing over the bark's port bow at the time; that when he previously saw the bark, as the fog lifted or sealed, he thought she was anchored close to the bank and the steamship on the other side of the bank to the westward; that at the beginning of the flood the tide sets about southwest; that he judged the tug towed the Aristos about five miles an hour.

Claimants' counsel then read the deposition of CHARLES HANSEN, chief officer of the Clyde-line steamer Delaware, taken before a notary public March 15, 1888, to the effect that on the afternoon of that day the Delaware left her pier in the East river at 4.10 p. m. and ran into fog below Governor's island; at 5 p. m. ran into thick fog; did not see the buoy at Bay Ridge because the fog was so thick, and at 5.20 came to an anchor off Staten island.

Claimants' counsel then read from the apostles the testimony of WILLIAM B. DAVIE, JR., examined on the trial in the district court, to the effect that he had been the keeper of Fort Tompkins
76 light for 17 years, and was in charge of it on the day of the collision; that he kept a record of the weather, and on this day his entry was: "During the day the wind was southwest with fresh breeze and cloudy up to four o'clock, then with heavy fog lasting from 4 o'clock p. m. until 6 p. m., wind south-southwest, clearing at 7 p. m.;" that he made entries of fog if it was anywhere within two miles of the light-house; at 4 o'clock the fog was thick, you could almost cut it with a knife; couldn't see twice the length of the court-room.

Claimants' counsel then read from the apostles the testimony of SAMUEL WRIGHT, examined on the trial in the district court, to the effect that he was a corporal in the regular army, stationed at Fort Wadsworth; that on the afternoon of May 24, 1887, he slept until 3.50 p. m. by the clock, then washed, and at about 4 p. m. he went to the light-house and noticed the weather, and that about 4 o'clock it was a thick fog—could see not over 50 yards; that he walked from the fort to the light-house and remained there till about 20 minutes of 5 p. m., and that all the while there it was a thick fog.

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Diagram No. I, drawn by Captain Morrison, Master of the Quickstep.

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Diagram No. 2, drawn by Captain Horrison, Master of the Quickstep.

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Diagram drawn by the Master of the S.S. Holberg.

Diagrams of the collision were drawn by the master of the Quickstep and by the master of the Ludvig Holberg. They were introduced in evidence, as was also chart No. 369, published by the U. S. coast and geodetic survey. They are as follows:

(Here follow diagrams marked pp. 77, 78, 79, & 80.)

81 Claimants' counsel thereupon offered in evidence a duly certified copy of the rule of the inspectors, as follows:

"Rule X, section 8. All steam vessels (except upon the Red River of the North and rivers whose waters flow into the gulf of Mexico), when engaged in towing during fog or thick weather, shall sound three distinct blasts of their steam-whistles in quick succession, repeating at intervals not exceeding one minute."

At the trial claimants' proctor submitted proposed findings, the only part of which pertinent to the exceptions is the fifth proposed finding, as follows:

Fifth. While said steamship was cautiously proceeding down the channel, keeping upon the starboard side as near the channel buoys as she could safely go, and at a speed of about 3½ knots an hour, the fog being still dense, a whistle was heard on the starboard bow, and directly afterward a tugboat, which proved to be the Leonard Richards, was seen close to the Ludvig Holberg, between two and three hundred feet off, bearing between half a point and a point on the steamer's starboard bow. The tugboat immediately blew two blasts of her whistle, which the Holberg answered with two assenting blasts and starboarded her helm. The tugboat came on at a rapid speed, heading to pass the steamship starboard to starboard, and when almost abreast of the Holberg's bows the lookout and officers of the Holberg first saw in the dense fog the loom or shadow of a bark in tow, which was afterwards learned to be the Quickstep, apparently bearing on the Holberg's port bow, and judged to be about 300 feet distant.

At the trial libellant's proctor submitted proposed findings to the court, of which the only ones pertinent to the exceptions were
82 the second paragraph of the second proposed finding, as follows: "While proceeding up, about in the middle of the main ship channel, and when about a quarter of a mile to the southward and eastward of buoy No. 11, at 4.26 p. m., she (the Quickstep) was run into by the steamer Ludvig Holberg, the latter vessel striking the bark on her port quarter abaft the mizzen-topmast backstay, cutting into the bark's after companion door a distance of about nine feet, cutting her open, so that the cargo rolled out." The statement in the fourth proposed finding: "And just before the collision (the Holberg) was running at the rate of about nine knots an hour." The fifth proposed finding, as follows: "That the steamship reached Fort Lafayette at about 4.05. The distance from the fort to the place of collision is three and three-eight-s knots, which the steamship ran in 21 minutes, or at the rate of about nine knots per hour over the ground. There was a flood tide and southerly wind and the set of the tide was about southwest."

The ninth proposed finding, as follows: "The Holberg did not have a competent and sufficient lookout and was not properly navigated, in not having competent men at the wheel. The tug was not seen until within four hundred feet and the bark was not seen until after the tug was abreast of the Holberg and at a distance of about two hundred feet and after the towing hawser was discovered." And the tenth proposed finding, as follows: "The Holberg did not take seasonable and proper precautions to avoid the collision. She did not change her course in time or sufficiently to keep out of the way of the tug and bark. She did not conform to the whistles which were blown by the tug. She was proceeding at an immoderate rate of speed in the channel. She did not stop and reverse her engines until the collision became imminent and took no steps to keep out of the way of the bark."

83 Libellant also asked the court to make conclusions of law, of which the only one pertinent to the exceptions was the second, as follows: "The Holberg was in fault for the collision and is liable for the damages resulting therefrom."

The court made and filed on June 5th, 1890, the following findings of fact and conclusions of law, which it corrected in certain respects on June 24th, 1890, after further argument, upon the motion of the libellant's counsel. They are as follows:

Circuit Court of the United States, Southern District of New York.

JAMES E. STAFFORD, Libellant and Appellant,
vs.
THE STEAMSHIP "LUDVIG HOLBERG," HER ENGINES, &C., Claimant & Appellee.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY, Libellant & Appellant,
vs.
THE STEAMSHIP "LUDVIG HOLBERG," HER ENGINES, &C., Claimant & Appellee.

Findings of Fact.

(1.) The libellant Stafford was the owner of the bark Quickstep before and at the time of her loss on the 24th of May, 1887. The libellant The F. O. Matthiessen & Wiechers Sugar Refining Company is a corporation and was the owner of a cargo of sugar laden on board said bark.

(2.) On the afternoon of the 24th day of May, 1887, the bark Quickstep, laden with a cargo of sugar, was being towed from sea into the port of New York by the tugboat Leonard Richards on a hawser 80 fathoms long. While proceeding up about in the

84 middle of the main ship channel and when a little to the southward and eastward of buoy No. 11, at about 4.26 p. m., she was run into by the steamship Ludvig Holberg, the latter vessel striking the bark on her port quarter about the mizzen-topmast backstay, cutting in to her after companion door—a distance of

about nine feet—cutting her open so that the cargo rolled out. Immediately after the collision said bark began to sink and, while sinking, was towed by the tug onto the west bank, where she grounded in 25 feet of water about a quarter of a mile below buoy No. 11 and became a total loss and her cargo was nearly all lost.

(3.) The bark was 170 feet long, 37 feet beam, 23 feet depth of hold, and was laden with 1,024 tons of sugar and drew 20 feet of water.

(4.) The Ludvig Holberg, which hails from Bergen, Norway, was an iron-screw steamship of 687 tons register, 200 feet long. The claimants, Christopher Kahrs and others, were her owners. She was in ballast, drawing 13 feet aft and 9 feet forwaed, bound for Barracoa for fruit. She was tight, staunch, strong, and properly manned and officered, having a competent master and officers and a full complement of men. At and prior to the time of collision her master and pilot were on the bridge. She steers by hand, and there was at her wheel one ordinary seaman, steering the vessel as directed by the pilot. The first officer and second officer were on lookout on the port and starboard sides respectively of the forestay, which is fastened to the stem. Back of them, by the windlass, was the carpenter, also on lookout.

(5.) The steamship started from pier 15 East river some time between 3.05 and 3.15 p. m. She ran slow out of the East river, but soon increased to full speed, and continued to run at that rate until, fog having set in, she reduced to half speed, and later
85 to dead slow. Her motion through the water was, while at full speed, about 9 to 9½ knots; while at half speed, about 6½ to 7 knots; while at dead slow, about 3½ knots an hour. She had been running at the latter rate for a few minutes only, probably not more than four or five, before the collision. The pitch of her screw was 14 feet 2 inches, and at full speed she made from 69 to 71 revolutions per minute; at half speed, from 40 to 45 to 50 revolutions per minute, and at slow speed from 20 to 25 to 26 revolutions per minute.

(6.) She was off Bedloe's island between 3.27 and 3.32, and it was nearly 4 o'clock when she reached Fort Lafayette. The distance from that point to the place of collision is a little over 3½ knots. She carried the ebb tide with her from Bedloe's island to a little below the forts. After a brief period of slack water and until the collision there was a flood tide. Its set was about S. W., which helped a vessel coming in about one knot an hour, and a vessel going out about half a knot an hour. The wind was southerly, blowing a stiff breeze.

(7.) At the time and place of collision there was so much fog as to prevent vessels from being visible to each other for more than a short distance (estimated by the witnesses from the Holberg at between 200 and 300 feet), and such as to require the sounding of fog signals under the rules. Such signals were sounded by the Ludvig Holberg. This fog had prevailed between the Narrows and buoy No. 11 during a period of at least 15 minutes before the collision.

(8.) The Ludvig Holberg ran into this fog about the time she passed the forts, and at that time began sounding fog signals, but did not reduce her speed until she had run some distance below the forts. Then she reduced to half speed only, and did not
86 further reduce her speed until about buoy No. 13.

(9.) By the time she reached a point a little below buoy No. 13 she had slowed down to about four knots over the ground. From that point to the place of collision, a distance of about 1,500 feet, she did not increase her speed, proceeding down the channel, keeping upon the starboard side, as near the channel buoys as she could safely go, and sounding fog signals from time to time.

(10.) While she was thus proceeding she heard one blast right ahead, then another a little more on the starboard bow. Both these were blown by the tug, which was not at that time visible through the fog to those on board the Holberg.

(11.) Almost immediately thereafter the tug came in sight only a few hundred feet off and a little on the steamer's starboard bow, and gave a signal of two blasts.

(12.) Neither the bark nor the hawser were then visible, and no signals indicated to the Ludvig Holberg that the tug had a tow nearly 500 feet behind her.

(13.) Upon receiving the whistle of two signals from the tug, the steamer starboarded and passed the tug starboard to starboard, clearing her about 30 feet.

(14.) Then, for the first time, the Ludvig Holberg became aware of the presence of the Quickstep, which was not following directly after the tug, but to starboard of her, and whose pilot at that time, by putting her wheel hard-a-port, threw her head somewhat more to starboard.

(15.) Thereupon the steamship ported in order to go between the tug and the bark, at the same time hailing the tug to cast off the hawser.

87 (16.) If the hawser had been cast off promptly the steamer would probably have gone safely between the tug and the bark.

(17.) The hawser was not cast off, and the steamer running against it with her starboard bow parted it, and at the same time her bow was swung to port, resulting in collision with the bark's port quarter.

(18.) The steamer stopped and reversed as soon as she saw that the tug had a vessel in tow, but not before, and was nearly stopped at the time of collision.

(19.) Had the steamer been aware when she starboarded to pass the tug that the latter vessel had the Quickstep in tow on a hawser of 80 fathoms, she could and in all probability would have avoided the collision.

Conclusions of Law.

(1.) Said collision was not due to any fault or negligence of those in charge of the Ludvig Holberg.

(2.) The libels herein should be dismissed, as already decreed by the district court, with costs to the claimants in both courts.

E. HENRY LACOMBE.

The libellant moved the circuit court to correct and make definite certain of its findings and to make additional findings and conclusions, some of which the court granted. Those which the court refused, and which are pertinent to the exceptions, are as follows:

First. That the second finding be amended and made more definite and certain by stating how far to the southward and how far to the eastward of buoy 11 the collision occurred, or that said finding be made more specific than it now is by the use of the
88 expression "a little."

Fourth. That the fifth finding be amended by striking out the word "dead" before the word "slow" in the two places in which it occurs in said finding.

Fifth. That the sixth finding be amended and made more definite and certain by striking out the words "between 3:27 and" and inserting in the place thereof the words "about," or otherwise specifying more exactly the time when the Holberg was off Bedloe's island.

Sixth. That the sixth finding be amended by striking out the words "a little over three and one-eighth" and inserting "three and three-eighths knots," or by indicating how much over three and one-eighth knots is intended by the expression "a little over."

Eighth. That the seventh finding be amended by inserting the word "dense" before the word "fog" in the sentence, "There was so much fog as to prevent vessels," etc.

Ninth. That the seventh finding be amended and made more definite and certain by striking out the words "a short distance" and inserting the words "about two hundred feet," or such other distance as the court shall find upon the evidence that the vessels could be seen in that fog.

Tenth. That the seventh finding be amended by inserting the word "dense" before the word "fog" in the sentence, "This fog had prevailed between the Narrows and buoy 11."

Eleventh. That the seventh finding be amended by striking out the word "fifteen" and inserting the word "twenty."

Twelfth. That the eighth finding be amended by striking out the words "about the time" and inserting in place thereof the
89 word "before" in the sentence, "The Ludvig Holberg ran into this fog about the time she passed the forts."

Thirteenth. That the eighth finding be amended and made more definite and certain by specifying how much below the forts the Ludvig Holberg had got before she reduced her speed in place of the expression "some distance."

Fourteenth. That the ninth finding be amended and made more definite and certain by indicating how much below in place of the expression "a little below" the Holberg had got when she had slowed down to about four knots and the time when she so slowed.

Fifteenth. That the eleventh finding be amended and made more

definite and certain by specifying how many hundred feet off or about how many feet off the tugboat was when she first came in sight.

Sixteenth. That the thirteenth finding be amended by stating that the steamer starboarded about one point or as much as the court finds the fact to be that she did starboard.

Seventeenth. That the thirteenth finding be amended by adding thereto the words "by reason of the tug at the same time taking a rank sheer to port."

Eighteenth. That the fourteenth finding be amended by inserting the words "in obedience to his single whistle" after the words "to starboard of her."

Nineteenth. That the eighteenth finding be amended by inserting the words "but not before" after the words "vessel in tow."

Twentieth. That an additional finding of fact and conclusion of law be made to the effect that some of the witnesses who testified as to the fog in the district court were examined before the
90 district judge, and that it is to be assumed as matter of law that the effect which the appearance of such witnesses produces on the district court is a fact proper to be considered by the circuit court in reaching a conclusion or some similar conclusion of law which would state the legal effect intended to be given to the court by the fact that some witnesses were so examined before the district judge. And thereupon the circuit court made the following order:

At a stated term of the circuit court of the United States for the southern district of New York, held at the circuit court rooms, in the post-office building in the city of New York, on the 20th day of June, 1899.

Present: Hon. E. Henry Lacombe, circuit judge.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY, Libt & App'Tt,
vs.
THE STEAMSHIP LUDVIG HOLBERG, HER ENGINES, &c.; CHRISTOPHER KAHRS *et al.*, Cl'm'ts & Ap'lees.

The libellant having moved for a rehearing herein and for further findings and to correct the findings filed herein on reading and filing the affidavit of George A. Black and the order to show cause granted thereon, after hearing George A. Black, Esq., in support of said motion, and Harrington Putnam, Esq., in opposition thereto, it is ordered that the libellant's proposed amendments to the second, fifth, eighth, ninth, eleventh, thirteenth, and fourteenth findings of fact, as specified in the schedule annexed to the moving papers, be disallowed and the proposed additional finding of fact and conclusion of law specified in the twelfth paragraph of said schedule be refused, and the motion therefore denied; and
91 it is further ordered that the second proposed amendment be granted, and that the fifth finding of fact instead of the

fourth be amended by adding thereto the words "the pitch of the screw was 14 feet 2 inches, and at full speed she made from 69 to 71 revolutions per minute; at half speed from 40 to 45 to 50 revolutions per minute, and at slow speed from 20 to 25 to 26 revolutions per minute;" that so much of the proposed amendments to the sixth finding of fact as proposed to insert the words "after a brief period of slack water" be granted and the balance thereof refused; that the proposed amendment to the seventh finding of fact be denied, but the words "estimated by the witnesses from the Holberg at between two hundred and three hundred feet" are hereby ordered to be inserted after the words "a short distance," in the seventh finding, and that the proposed amendment to the eighteenth finding of fact be allowed; and it is ordered that the words "but not before" be inserted in said eighteenth finding after the words "a vessel in tow;" and it is further ordered that the libellant's motion for a rehearing be denied; and it is further ordered that the libellants have sixty days from the date of this order within which to prepare exceptions and a bill of exceptions.

June 20th, 1890.

E. HENRY LACOMBE.

Thereafter the libellant made and filed the following exceptions, which were duly allowed by the said circuit court:

U. S. Circuit Court, Southern District of New York.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY, Libellant & Appellant,
vs.
THE STEAMSHIP LUDVIG HOLBERG; CHRISTOPHER KAHRS *et al.*, Claimants & Appellees.

92 *Exceptions on Behalf of Libellant.*

1. The libellant excepts to the refusal of the court to grant the libellant's first proposed amendment to the second finding on the ground that the same was material, and that it was conclusively proved by uncontradicted evidence that said collision occurred between 600 and 1,500 feet south of buoy No. 11 and between 1,500 and 3,000 feet to the eastward of it.

2. Libellant excepts to so much of the fourth finding as finds that the Holberg was properly manned in connection with the finding that she steered by hand and had one ordinary seaman at the wheel it by such finding it is intended that one seaman at her wheel was sufficient in the fog then prevailing.

3. Libellant excepts to the refusal of the court to grant the fourth of libellant's proposed amendments to the fifth finding on the ground that the same is material and proved by uncontradicted testimony and the other findings of time and distance.

4. Libellant excepts to so much of the fifth finding as finds that the Holberg (fog having set in) reduced to half speed and later to dead slow, *and* that dead slow was about 3½ knots an hour, and

that "she had been running at the latter rate (*i. e.*, dead slow) for a few minutes only, probably not more than four or five, before the collision."

5. Libellant excepts to the refusal of the court to grant the libellant's fifth proposed amendment to the sixth finding on the ground that the same was material, and that it was conclusively proved by uncontradicted evidence that the Holberg was off Bedloe's island after 3.32 p. m.

93 6. Libellant excepts to the refusal of the court to grant the libellant's sixth proposed amendment to the sixth finding on the ground that the same was material, and that it was conclusively shown by uncontradicted evidence that the place of collision was between 600 and 1,500 feet below buoy No. 11 and was between 3¼ and 3¾ knots from Fort Lafayette.

7. Libellant excepts to so much of the sixth finding as finds that it was "nearly 4 o'clock when the Holberg reached Fort Lafayette" on the ground that it is conclusively proved by uncontradicted evidence that it was after 4 o'clock, and that it was about 4.05 p. m. when she reached Fort Lafayette, and that such finding of the exact time was material to the determination of the cause.

8. Libellant excepts to the refusal of the court to grant the eighth of libellant's proposed amendments to the seventh finding on the ground that the same was material and was conclusively proved by uncontradicted evidence and was admitted by claimants in their fifth proposed finding.

9. Libellant excepts to the refusal of the court to grant the ninth of libellant's proposed amendments to the seventh finding on the ground that the same was material and was conclusively proved by uncontradicted evidence and was admitted by the claimants in their fifth proposed finding.

10. Libellant excepts to the refusal of the court to grant the tenth of libellant's proposed amendments to the seventh finding on the ground that the same was material and was conclusively proved.

11. Libellant excepts to the refusal of the court to grant the eleventh of libellant's proposed amendments to the seventh finding on the ground that the same was material and was conclusively proved and is established by the other findings.

94 12. Libellant excepts to the refusal to find the twelfth of libellant's proposed amendments to the eighth finding on the ground that the same is material and conclusively proved and is admitted by claimant's answer.

13. Libellant excepts to so much of the eighth finding as finds that the Holberg reduced her speed below the forts on the ground that the contrary is established by conclusive evidence and by the other findings of time and distance.

14. Libellant excepts to so much of the eighth finding as finds that the Holberg reduced her speed to half speed and further reduced about buoy 13.

15. Libellant excepts to the refusal of the court to allow the libellant's thirteenth proposed amendment to the eighth finding on the ground that the same was material.

16. Libellant excepts to the refusal of the court to allow the libellant's fourteenth proposed amendment to the ninth finding on the ground that the same was material.

17. Libellant excepts to so much of the ninth finding as finds that the Holberg had slowed down to about four knots over the ground by the time she had reached a point a little below buoy No. 13 on the ground that such finding is material and that the same is contrary to the conclusive evidence in the case and is opposed to the other findings.

18. Libellant excepts to so much of the ninth finding as finds that the Holberg did not increase her speed from that point (*i. e.*, a little below buoy No. 13) to the place of collision on the ground that such findings is material and contrary to the conclusive evidence in the case and to the other findings.

95 19. Libellant excepts to the refusal of the court to allow libellant's fifteenth proposed amendment to the eleventh finding on the ground that the same was material and that it was conclusively established by uncontradicted evidence and by the answer of the claimants and admitted by claimants' fifth proposed finding that the tug was seen close to the Holberg and between two and three hundred feet off.

20. Libellant excepts to so much of the twelfth finding as finds that "no signals indicated that the tug had a tow nearly 500 feet behind her" on the ground that the same is material and opposed to and contradicts the other findings in the case.

21. Libellant excepts to the refusal of the court to allow the libellant's sixteenth amendment to the thirteenth finding on the ground that the same is material and is conclusively established by uncontradicted evidence.

22. Libellant excepts to the refusal of the court to allow the libellant's seventeenth amendment to the thirteenth finding on the ground that the same is material and conclusively proved by uncontradicted evidence.

23. Libellant excepts to the refusal of the court to allow the libellant's eighteenth amendment to the fourteenth finding.

24. Libellant excepts to the sixteenth finding on the ground that the same is unsupported by the evidence and is immaterial, inasmuch as it is not found that there was time in which to cast off the hawser.

25. Libellant excepts to that part of the eighteenth finding which states the Holberg was nearly stopped at the time of the collision on the ground that the contrary thereof is conclusively established by the evidence.

96 26. Libellant excepts to the nineteenth finding as immaterial and not supported by the evidence, inasmuch as it was proved that it was not the starboarding of the Holberg which prevented the collision with the tug, but the rank sheering of the tug, which got her out of the Holberg's path.

27. Libellant excepts to the refusal of the court to grant the libellant's twentieth amendment and to make the additional finding and conclusion therein requested.

28. Libellant excepts to the first conclusion of law.

29. Libellant excepts to the second conclusion of law.

30. Libellant excepts to that part of the opinion of the court which states that "some of the witnesses who testified on this branch of the case were examined before the district judge. His decision, therefore, is affirmed."

31. Libellant excepts to the refusal of the court to find that part of libellant's second proposed finding which states that the collision happened about a quarter of a mile to the south-ard and eastward of buoy No. 11 on the ground that said finding was material and was conclusively established.

32. Libellant excepts to the refusal of the court to find that part of libellant's fifth proposed finding which states that "the steamship (Holberg) reached Fort Lafayette about 4.05."

33. Libellant excepts to the refusal of the court to find that part of libellant's fifth proposed finding which states that "the distance from the fort to the place of collision is 3¾ knots" on the ground that the same is material and is conclusively proved.

34. Libellant excepts to the refusal of the court to find that part of libellant's fifth proposed finding which states that the
97 steamship ran the 3¾ knots in 21 minutes, or at the rate of about 9 knots an hour over the ground, on the ground that the same was material and conclusively established.

35. Libellant excepts to the refusal of the court to find that part of libellant's fourth proposed finding which states that "just before the collision the Holberg was running at the rate of about 9 knots an hour" on the ground that the same was material and was conclusively proved.

36. Libellant excepts to the refusal of the court to find that part of the libellant's ninth proposed finding which states that the Holberg was not properly navigated in not having competent men at the wheel on the ground that the same was material and was conclusively proved.

37. Libellant excepts to the refusal of the court to find the libellant's tenth proposed finding on the ground that the same is material and conclusively proved.

38. Libellant excepts to the refusal of the court to make the second of libellant's proposed conclusions of law.

SIDNEY CHUBB,
Proctor for Libellant.

And the circuit court, having reserved leave to libellant to make and file exceptions and to prepare a bill of exceptions, made the following final decree:

At a stated term of the circuit court of the United States for the southern district of New York, held at the U. S. court-rooms, in the city of New York, on the 7th day of June, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

98 F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY, Libellant & Appellant,
against
THE NORWEGIAN STEAMSHIP LUDVIG HOLBERG, HER ENGINES, &c., Impleaded; Christopher Kahrs and Others, Claimants & Appellees.

This cause having been heard on appeal upon the pleadings and proofs of the respective parties and having been argued by the respective advocates, now, on motion of Wing, Shoudy & Putnam, proctors for the claimants and appellees, it is ordered, adjudged, and decreed that the libel herein be, and the same hereby is, dismissed with costs; and it is further ordered, adjudged, and decreed that Christopher Kahrs and others, the claimants and appellees, recover herein against The F. O. Matthiessen & Wiechers Sugar Refining Company, the libellant, the sum of three hundred and forty $\frac{78}{100}$ dollars ($340.78), costs of the district court, together with sixty-three $\frac{55}{100}$ dollars, costs as taxed by the clerk of this court, making in all the sum of four hundred and four $\frac{33}{100}$ dollars; and it is further ordered, adjudged, and decreed that, unless this decree be satisfied or proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of this court, the stipulators for costs on the part of the libellant cause the engagements of their stipulations to be performed or show cause why execution should not issue against their goods, chattels, and credits to enforce the same, and that the Holland Trust Company pay to Wing, Shoudy & Putnam, the proctors for the appellees, the said sum of four hundred and four $\frac{33}{100}$ dollars out of the sum of four hundred dollars ($400) deposited with them under order of the district court dated January 28th, 1889, and interest thereon, without prejudice to preparation and settlement of bill of exceptions.

99 June 20, 1890.

E. H. LACOMBE.

And forasmuch as the aforesaid proceedings and exceptions do not appear upon the record of the cause, and to the end that all the evidence taken and submitted on said hearing bearing upon said exceptions may appear, the said circuit judge has this day settled the foregoing bill of exceptions and signed and sealed the same.

E. HENRY LACOMBE.

We have examined the foregoing and same agrees with case & amendments proposed & settled.

N. Y., April 2, 1891.

WING, SHOUDY & PUTNAM,
Proctors for Ludvig Holberg.

(Endorsed:) U. S. circuit court, southern district of New York. The F. O. Matthiessen & Wiechers Sugar Refining Company, libellant & appellant, *vs.* The Steamship "Ludvig Holberg," her engines,

&c.; Christopher Kahrs *et al.*, claimants & appellees. Bill of exceptions. Sidney Chubb, proctor for lib't, 50 Wall street, New York city. U. S. circuit court. Filed Ap'l 13, 1891. John A. Shields, clerk.

100 United States District Court, Southern District of New York.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING CO. }
against }
THE STEAMSHIP "LUDVIG HOLBERG" and THE STEAM-TUG "LEONARD RICHARDS." }

Sidney Chubb, for libellant (Geo. A. Black, of counsel); Wing, Shoudy & Putnam, for the Holberg.

BROWN, *J.*:

On the 24th of May, 1887, as the bark "Quickstep" was coming up the lower bay in tow of the tug "Leonard Richards" upon a hawser from 70 to 100 fathoms long, she came into collision with the steamship "Ludvig Holberg" on her way out to sea. She was struck on her port quarter a little aft of the mizzen chains by the steamer's port bow or stem at an angle of about three points, and a large hole stove in, through which she speedily filled with water. Before sinking she was towed by the tug a few lengths only to the flats on the west bank, about one-quarter mile below buoy No. 11.

The above libels were filed to recover $87,000 for loss of ship and cargo. The collision took place at about 4.25 p. m. The testimony is extremely conflicting whether at that time or shortly before there was enough fog to interfere with ordinary navigation and to require fog signals. Most of the libellant's witnesses affirm that there was not, and no fog signals were given by them. The respondent's witnesses maintain that the fog had set in from 15 to 30 minutes before, and became so dense that neither the tug nor the bark could be seen over 400 feet distant; that the steamer was going dead slow, not over three and a half knots speed, and was regu-
101 larly sounding her fog whistle. The witnesses from the tug and the bark testify that at and before the collision, although the weather was hazy, vessels could be seen half a mile distant; that the steamer was seen at that distance; that no fog whistles were sounded, and that none were needed. Witnesses from other vessels were called to substantiate the account of each in this point. For the libellant officers from the "Old Dominion" and "Wyanoke," which were going out to sea at about the same time with the "Holberg" and ahead of her, testified that they met no dense fog until they reached the entrance of the swash channel at buoy No. 8, about a mile and a half below the place of collision, the former at 4.26 p. m.; the latter at 4.32. The latter, however, in her log noted that it was foggy at 4.20, and, though buoy No. 8 was seen by her officers before it was reached, it could not be seen when passed very near. Both those vessels saw the tug and bark when

they passed them from 300 to 500 yards distant. The master of the "St. Johns," which runs on schedule time between pier 8 and Sandy Hook, and passed the tug and bark still nearer the time of the collision and a little to the westward of them, testified that he found it densely foggy from the Narrows downwards; and the officer in charge at Fort Tompkins light, whose duty it was to observe and enter the weather, testified that a dense fog came on at 4 p. m., and was so noted in his record; and another witness from the earthworks at Fort Wadsworth above testified to the same effect. Upon repeated consideration of this most embarrassing testimony, I must find that during a period of at least 15 minutes before the collision there was so much fog between the Narrows and buoy No. 11 as to prevent vessels being visible to each other for more than a short distance; such as to require the sounding of fog signals under the rules, and that such signals were sounded by
102 the "Holberg," as her witnesses state; that these signals were heard by the "St. Johns," as testified to; that the "Holberg" at that time was going "dead slow," not over three and a half knots; that the tug became first visible only a few hundred feet off—a little on the steamer's starboard bow; that neither the bark nor the hawser were then visible, and that no signals indicated to the steamer that the tug had a tow some 400 to 500 feet behind her; that the steamer rightly starboarded on receiving a signal of two whistles from the tug when she was first seen and passed at a safe distance from the latter, starboard to starboard; that through the want of any signals from the tug to indicate, as required by the rules, that she had a tow behind her, the steamer was unable to avoid the bark, which she might and undoubtedly would have avoided had such signals been given; that the bark was not following directly after the tug, but was to starboard of her, and, by putting her wheel hard-a-port, threw her head somewhat more to starboard; seeing which, the steamer properly ported in order to go between the tug and the bark, at the same time hailing the tug to cast off the hawser; that if the hawser had been cast off promptly the steamer would probably have gone safely between the two; that the hawser was not cast off, and the steamer running against it with her starboard bow parted it, and at the same time her bow was swung to port, resulting in collision with the bark's port quarter; that the steamer reversed as soon as danger from the bark was apparent, and was nearly stopped at the collision; that the tug and bark did not stop, and that the force of the blow arose mainly from the forward motion of the bark. The following considerations have led me to this conclusion:

1. It is to be noted, though I do not lay great stress upon this circumstance, that, although the channel-way was three-quar-
103 ters of a mile wide, these vessels at the time of the collision were very near the westerly side. This is the more peculiar as respects the tug and bark inward bound, since, if there was no fog and both shores could be seen, as they allege, their direct and natural course was apparently on the easterly side of the channel. I do not find any explanation other than foggy weather of their

shaping their course to the left almost to the limit of the channel-way while the courses of both the tug and the steamer would be natural enough if they were feeling their way in a fog along the line of the buoys, which, as seen from time to time, would give them assurance of their positions.

2. The general narrative of the steamer's witnesses is in the main straightforward, intelligible, and consistent. The story of the pilot of the bark is so confused and, as it seems to me, so inconsistent as to be scarcely intelligible. The bark's testimony that the steamer was seen half a mile distant and that the bark was almost directly in line behind the tow allows no rational explanation of the collision. As the steamer went well clear of the tug and to the eastward of her after the exchange of two whistles, it is incredible, if the bark, being then 450 to 600 feet behind the tug, was in line or nearly in line with the tug and in plain view, that the steamer could have run into her unless it was done deliberately. The pilot of the bark, moreover, gave five different orders for a change of helm, four of which were obeyed, the fifth being just at the moment of collision. The wheelsman, Ludden, who gives the clearest account of these particulars, states that they were all given in quick succession, and that the steamer was first seen a little on the port bow. The other wheelsman says she was a quarter of a point on the port bow. The first order was "hard-a-starboard." As soon as the helm was hard over came the
101 order "hard-a-port," next "hard-a-starboard," then "hard-a-port," as the steamer was just on the point of striking the hawser or afterwards—I cannot make out with certainty whether before or after—and again "hard-a-starboard" after the hawser had parted and at the moment of collision. The evident confusion and hurry of these orders and the express testimony of the witness Ludden show that they were given within a very short interval. No reliance can be placed on this estimate of eight minutes. The change of heading on the first two orders he estimates at only half a point. The first order of "hard-a-starboard" was given when the signal of two whistles was exchanged, and the rapid succession of the orders shows that the steamer could have been then only a short distance from the tug, as the steamer's witnesses assert. Nothing but fog can rationally explain these hurried and confused orders. Her changes were more numerous and much nearer together than those of the "Harvest Queen." (The Adriatic, 107 U. S., 512, 518; 2 Sup. Ct Rep., 355.)

3. Unless there was such fog as to require the fog whistles to be sounded in the judgment of the master and pilot of the steamer, and unless they did sound their fog signals and reduce their speed first to "half speed" and next to "slow," their narrative is a sheer fabrication. There is not sufficient evidence to warrant finding their testimony a fabrication. Their evidence is in no way impeached, and they are sustained by several witnesses wholly disinterested.

4. The steamer's time from her wharf to the place of collision, to which reference has been made by counsel, rather confirms than

weakens her witnesses' statements as to her slowing on account of fog. Taking the libellant's estimated time of getting under way after turning at 3.15 p. m., the latest that the testimony will reasonably admit, we find a little over 9½ nautical miles to the
105 place of collision run in an hour and ten minutes. It was low water that afternoon at Governor's island, according to the Government tide-tables at 2.32 p. m., but the current runs ebb out of the East river 1 h. 16 m. after low water and out of the North river and through the Narrows for over 2½ hours after low water, so that the steamer had the benefit of the outward current all the way at the average rate of about a knot an hour. (See note on tides.) Practically, therefore, the distance from abreast of Bedloe's island (where the steamer was under full speed of at least 9 knots at about 3.25 p. m.) was only about 8½ knots, and had she not slowed at all she would have been at 4.25 p. m. half a mile below the place of collision. She had probably been running "slow" about five minutes before collision, and at "half speed," viz., 6½ to 7 knots from below Craven's shoals, as the pilot at first stated, for some 10 minutes preceding. The place of collision was probably very near buoy 11, the southwesterly current carrying the bark afterwards more southerly to the point where she grounded.

5. The discrepancies between the outside witnesses as regards the density of the fog may be accounted for in part by the difference in location and the fact which several mention that the fog was variable, lifting up at one time and settling down at another, and in part by the different judgments that different persons would form as to the density of the fog, the distance at which they could see objects, and the degree of density that makes fog signals necessary, as well as the different habits of different masters in regard to sounding fog signals. It is certainly significant, considering that the weather had been thick and hazy before, that the chief officer of the "Wyanoke" noted in his log that the weather was "foggy" at 4.20 p. m. If the "Wyanoke" did not reduce speed until she reached the swash channel she must have been at 4.20 above buoy 11 and found it foggy there, and that
106 would agree with the time when the "Holberg" changed to "slow," five minutes before collision. Some further explanations of the discrepancies between the witnesses of the bark and of the "Ludvig Holberg" may be found in the fact, often testified to before me, that objects cannot be distinguished so easily or so far in looking towards the fog as in looking away from it. The bark's witnesses may, therefore, have been able to distinguish the steamer before the latter could distinguish the bark. A number of the bark's witnesses, moreover, estimate the distance at which they could see the steamer at half a mile, or "inside of half a mile." This indicates the presence of very considerable fog. As regards signals, the mate of the tug and the pilot of the bark differ. There is no question that the steam-tug gave one or two single blasts of the whistle and afterwards a signal of two blasts. The first blasts were understood by the steamer as fog signals, and on looking sharply when the first whistles were heard the tug could not be

seen. Presently, and as soon as she could be seen, the tug was observed a little on the steamer's starboard bow and signals of two blasts were immediately exchanged. I think it was then that the bark put her helm hard-a-starboard and that that was her first order. I doubt whether any previous signal of two blasts was given. The mate of the tug states that only one signal of two blasts was given by the tug. Upon all this testimony I think that the claimants' account of the matter is the most rational and probable; that the primary fault was in the tug for using so long a hawser and for giving no fog signals indicating the presence of a tow. These faults are the same as in the case of the "City of Alexandria" (31 Fed. Rep., 427). Upon these facts I cannot find the "Ludvig Holberg" in fault. She was going dead slow. She
107 properly went to the left under a signal of two whistles and a starboard wheel. Had the bark maintained her own starboard wheel as at first, the wheelsman of the latter says they would "decidedly have gone clear, starboard to starboard." Both vessels were comparatively small, the bark but 170 feet long, the steamer 200 feet. Both could change their direction, therefore, much quicker than larger vessels, and, unless the bark was much more out of line with the tug than her witnesses admit, the wheelsman's judgment must be correct. If she was so much out of line as the steamer's witnesses estimate, perhaps that is doubtful. The bark, however, by putting her helm hard-a-port after starboarding, destroyed what chance there was of avoiding collision by going starboard to starboard, and in that situation I have no doubt the steamer did right in porting so as to go between the tug and bark, at the same time hailing them to cast off the hawser. This ought to have been done (The Galileo, 28 Fed. Rep., 169, 173–4). It was not the steamer's fault that it was not done, nor can I find that she did not reverse as soon as the presence and situation of the bark could be discerned. I am not called on to determine whether the bark was in fault in making these numerous changes of helm. Accepting in the main the steamer's testimony as to the fog, these changes would seem to be the result of the discovery of the steamer nearly upon her and to have been made *in extremis*. The true immediate cause of the collision, in my judgment, was the failure to sound the proper fog signals to indicate the presence of a tow or to cast off the hawser. The libels must be dismissed with costs.

Note on Tides.

"The well-known difference between the rise and fall of the tides and the flood and ebb currents in the harbor of New York have been carefully observed and tabulated in the reports of the
108 coast survey. Independent of the effects of freshets or of high winds, it appears that:

1. The mean interval of high water at Sandy Hook after the moon souths is 7 h. 35 m., varying from this about half an hour each way during each lunar period, *i. e.*, about half an hour earlier, roughly speaking, towards the middle of the moon's first and third

quarters, and a half hour later about the middle of the second and fourth quarters; at Governor's island the mean interval is 32 min. greater, or 8 h. 7 min. after the moon souths, with similar variations.

2. The slack before flood and ebb lasts about 20 min.; in the East river, 10 min.; in the North river, 35 min.

3. Between Governor's and Bedloe's islands the current begins to run ebb 2 h. 35 min. after high water there; continues ebb 7 h. 7 min., *i. e.*, till about 3 h. 10 m. after low water, when it becomes slack for 20 min. and then runs flood for 4 h. 33 m., or 2 h. 15 m. after high water. In the main channel off the west bank the current changes only about a half hour earlier each way.

4. Between Governor's island and the battery the current begins to run ebb 1 h. 46 m. after high water; continues ebb for 6 h. or till 1 h. 16 min. after low water; then after 10 min. slack it runs flood for 6 h., or until 1 h. 26 min. after high water.

5. At the Narrows the ebb current begins 1 h. 40 min. after high water at Governor's island; the flood 2 h. 20 min. after low water at the same place.

6. During the last two hours of the ebb current in the North river and at the Narrows there is a flood current of salt (heavier) water 15 feet below the surface and the same in the first hour of the ebb in the North river.

109 7. Off the Battery the current runs ebb in the North river 1 h. 54 min. later than in the East river, and runs flood 38 min. later.

8. In Buttermilk channel the flood current commences 47 min. earlier than between the Battery and Governor's island, the ebb current 32 min. earlier.

9. The average time the currents run is as follows: In the main channel off Sandy Hook, flood, 4 h. 56 min.; ebb, 6 h. 44 min. Off the west bank, flood, 4 h. 25 min.; ebb, 7 h. 15 min. At the Narrows, flood, 4 h. 21 min.; ebb, 7 h. 19 min. Between Bedloe's and Governor's islands, flood, 4 h. 53 min.; ebb, 7 h. 27 min. Between the Battery and Governor's island, flood, 5 h. 51 min.; ebb, 5 h. 49 min. Buttermilk channel, flood, 6 h. 6 min.; ebb, 5 h. 34 min.

10. The ebb and flood currents reach their maximum velocities about the end of the current's second hour; the flood a little earlier than the ebb. The average maximum of the ebb current at the Narrows is about 1.5 knots; of the flood, 1.2 knots; at 39th street, North river, maximum ebb, 2.7 knots; flood, 2 knots. East river and 23rd street, ebb, 2 knots; flood, 1.8 knots. Off the Battery, in both the North and East rivers, about 2 knots, both flood and ebb. In the first and last hours the currents are about half these rates.

All the above are only proximate statements and mean averages, as near as ascertainable, there being minor differences at different times and places and daily fluctuations, with other variations under extraordinary circumstances. See Coast Survey Reports for 1865, pp. 167 to 169; for 1888, bulletin No. 3; tide tables of 1888, pp. 216, 217; charts in Army building, in New York. High water as per Government tide tables. Others differ."

110 U. S. Circuit Court, Southern District of New York.

THE F. O. MATTHIESEN AND WIECHERS SUGAR REFINING COMPANY, Libellant and Appellant,
vs.
THE STEAMSHIP "LUDVIG HOLBERG," HER ENGINES, &c., Claimant and Appellant.

LACOMBE, *Circuit Judge:*

As to the presence or absence of fog and as to the speed of the Ludvig Holberg, the two determinative questions of fact in this case, there is great conflict of testimony. The witnesses from the Holberg testify most positively that during their run from the Narrows to below buoy No. 11 so dense a fog prevailed that vessels could be seen only at a short distance, and that the steamer sounded fog signals and reduced her speed. Those from the barque and the tug as positively assert the contrary. Of the witnesses other than those from these three vessels, some support the libellant's case, others that of claimants. Finally, in the testimony of nearly every witness, there is much inconsistency, and it is impossible to frame such a theory of what occurred as will harmonize with all the proof. Some of the witnesses who testified on this branch of the case were examined before the district judge. His decision, therefore, is affirmed. In so doing, the evidence of those on the Holberg must be in part accepted and in part discredited—either the fog prevailed for a time much less than they say it did or she ran full speed for some time after it shut in. It is, however, natural to expect that a witness who is testifying to the density of the fog or the duration of a period of reduced speed, when the fog or reduction of speed is supposed by him to help his side of the case, will exaggerate his estimate in both particulars. That his narrative thereby becomes inconsistent is not by itself sufficient to require its entire rejection, especially where it is in part corroborated by other proof. In this case the disinterested witness, who concededly was nearest
111 to the collision both in time and place, testified that he overtook and passed the Holberg going slow in a dense fog with her fog signals sounding, and that there was dense fog in the Narrows at about 4 p. m. is testified to by the light-house keeper at Fort Tompkins (whose evidence is corroborated by his log book) and by the soldier at the same fort. The decree of the district court is affirmed and the libels dismissed.

E. HENRY LACOMBE.

(Endorsed:) Circuit court of the United States for the southern district of New York. The F. O. Matthiesen & Wiechers Sugar Refining Company, libellant and appellant, *vs.* The Steamship Ludvig Holberg, her engines, &c., claimant and appellee. Opinion. U. S. circuit court. Filed June 5, 1890. John A. Shields, clerk.

U. S. Circuit Court, Southern District of New York.

The LUDVIG HOLBERG.

LACOMBE, *Circuit Judge:*

1. The proposed amendment to the second finding is refused. The evidence does not warrant a more specific statement.

2. The proposed amendment to the fourth finding is granted.

3. The proposed amendments to the fifth finding are refused. The evidence does not warrant a more specific statement.

4. The sixth finding is amended by inserting the words "after a brief period of slack water." The other proposed amendments to this finding are refused, the evidence not warranting more specific statements.

5. The proposed amendments to the 7th finding are refused for the same reason, but after the words "a short distance" there may be inserted "estimated by the witnesses from the Holberg at between 200 and 300 feet."

6. The proposed amendments to the 8th finding are refused for the same reason.

112 7. The proposed amendments to the 9th finding are refused for the same reason.

8. The proposed amendments to the 11th finding are refused for same reason.

9. The proposed amendments to the 13th finding are refused for the same reason.

10. The proposed amendment to the 14th finding is refused for the same reason.

11. The proposed amendment to the 18th finding is granted.

12. The proposed additional finding of fact and conclusion of law is refused.

It is not such a finding or conclusion as is contemplated by the act of 1875.

That act does not require the circuit judge to set forth among the findings and conclusions some small isolated fraction of the entire mental process by which, as a trier of the facts, he reached a conclusion touching the weight of conflicting evidence.

June 20th, 1890.

E. HENRY LACOMBE.

(Endorsed:) Circuit court of the United States for the southern district of New York. The Ludvig Holberg. Opinion, Lacombe, J. June 20, 1890. U. S. circuit court. Filed June 20, 1890. John A. Shields, clerk.

113 U. S. Circuit Court, S. D. of N. Y.

F. O. MATTHIESEN & WIECHERS SUGAR REFINING CO.
vs.
THE NORWEGIAN STEAMSHIP LUDVIG HOLBERG.

Satisfaction is acknowledged between the F. O. Matthiesen & Wiechers Sugar Refining Company, libellants and appellants, and

110 U. S. Circuit Court, Southern District of New York.

THE F. O. MATTHIESEN AND WIECHERS SUGAR REFINING COMPANY, Libellant and Appellant,

vs.

THE STEAMSHIP "LUDVIG HOLBERG," HER ENGINES, &C., Claimant and Appellee.

LACOMBE, *Circuit Judge:*

As to the presence or absence of fog and as to the speed of the Ludvig Holberg, the two determinative questions of fact in this case, there is great conflict of testimony. The witnesses from the Holberg testify most positively that during their run from the Narrows to below buoy No. 11 so dense a fog prevailed that vessels could be seen only at a short distance, and that the steamer sounded fog signals and reduced her speed. Those from the barque and the tug as positively assert the contrary. Of the witnesses other than those from these three vessels, some support the libellant's case, others that of claimants. Finally, in the testimony of nearly every witness, there is much inconsistency, and it is impossible to frame such a theory of what occurred as will harmonize with all the proof. Some of the witnesses who testified on this branch of the case were examined before the district judge. His decision, therefore, is affirmed. In so doing, the evidence of those on the Holberg must be in part accepted and in part discredited—either the fog prevailed for a time much less than they say it did or she ran full speed for some time after it shut in. It is, however, natural to expect that a witness who is testifying to the density of the fog or the duration of a period of reduced speed, when the fog or reduction of speed is supposed by him to help his side of the case, will exaggerate his estimate in both particulars. That his narrative thereby becomes inconsistent is not by itself sufficient to require its entire rejection, especially where it is in part corroborated by other proof. In this case the disinterested witness, who concededly was nearest
111 to the collision both in time and place, testified that he overtook and passed the Holberg going slow in a dense fog with her fog signals sounding, and that there was dense fog in the Narrows at about 4 p. m. is testified to by the light-house keeper at Fort Tompkins (whose evidence is corroborated by his log book) and by the soldier at the same fort. The decree of the district court is affirmed and the libels dismissed.

E. HENRY LACOMBE.

(Endorsed:) Circuit court of the United States for the southern district of New York. The F. O. Matthiesen & Wiechers Sugar Refining Company, libellant and appellant, *vs.* The Steamship Ludvig Holberg, her engines, &c., claimant and appellee. Opinion. U. S. circuit court. Filed June 5, 1890. John A. Shields, clerk.

U. S. Circuit Court, Southern District of New York.

The Ludvig Holberg.

Lacombe, *Circuit Judge:*

1. The proposed amendment to the second finding is refused. The evidence does not warrant a more specific statement.

2. The proposed amendment to the fourth finding is granted.

3. The proposed amendments to the fifth finding are refused. The evidence does not warrant a more specific statement.

4. The sixth finding is amended by inserting the words "after a brief period of slack water." The other proposed amendments to this finding are refused, the evidence not warranting more specific statements.

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11. The proposed amendment to the 18th finding is granted.

12. The proposed additional finding of fact and conclusion of law is refused.

It is not such a finding or conclusion as is contemplated by the act of 1875.

That act does not require the circuit judge to set forth among the findings and conclusions some small isolated fraction of the entire mental process by which, as a trier of the facts, he reached a conclusion touching the weight of conflicting evidence.

June 20th, 1890.

E. HENRY LACOMBE.

(Endorsed:) Circuit court of the United States for the southern district of New York. The Ludvig Holberg. Opinion, Lacombe, J. June 20, 1890. U. S. circuit court. Filed June 20, 1890. John A. Shields, clerk.

113 U. S. Circuit Court, S. D. of N. Y.

F. O. Matthiesen & Wiechers Sugar Refining Co.
vs.
The Norwegian Steamship Ludvig Holberg.

Satisfaction is acknowledged between the F. O. Matthiesen & Wiechers Sugar Refining Company, libellants and appellants, and

Christopher Kahrs and others, claimants and appellees, for the sum of $40163. Decree entered in the office of the clerk of this court on the 24th day of June, 1890.

WING, SHOUDY & PUTNAM,
Proctors for Owners & Claimants.
STEAMSHIP "LUDVIG HOLBERG,"
By HENRY T. WING.

STATE OF NEW YORK, }
City and County of New York, } ss.:

On this 9th day of August, 1890, before me personally came Henry T. Wing, one of the proctors for the claimants of the steamship Ludvig Holberg, known to me to be the person described in and who executed the above instrument, and he thereupon acknowledged that he executed the same.

CHARLES C. BURLINGHAM,
[SEAL.] *Notary Public, N. Y. County.*

Endorsed: U. S. circuit court, S. D. N. Y. F. O. Matthiesen & Wiechers Sugar Ref'g Co. *v.* S. S. Ludvig Holberg. Satisfaction of decree. U. S. circuit court. Filed Aug. 12, 1890. John A. Shields, clerk.

U. S. Supreme Court.

THE F. O. MATTHIESSEN and WIECHERS SUGAR REFINING COMPANY, Libellant and Appellant,
vs.
THE NORWEGIAN STEAMSHIP "LUDVIG HOLBERG," HER ENGINES, &c., Impleaded; Christopher Kahrs *et al.*, Claimants and Appellees.

To the Honorable the Supreme Court of the United States:

The appeal of The F. O. Matthiessen and Wiechers Sugar Refining Company, the above-named libellant and appellant, respectfully showeth—

That on the fourth day of June, 1887, the said libellant filed its libel in the district court of the United States for the southern district of New York against the steamship "Ludvig Holberg," her engines, &c., in a cause of collision, civil and maritime, for the recovery of damages sustained by libellant to cargo belonging to it laden on the bark "Quickstep," and that said steamship was arrested upon process issued upon said libel and was discharged upon the claimants above named filing their claim and entering into stipulations; that said claimants filed their answer to said libel, and such proceedings were had in the said cause that on the seventh day of September, 1889, the district court decree was made herein, wherein it was in substance adjudged that said libel be dismissed.

That after such final decree your petitioner duly appealed therefrom to the circuit court of the United States for the southern district of New York, and the said cause was removed thereby

into the said circuit court and there tried anew; and such proceedings were had in the said circuit court that afterwards, on the 7th day of June, 1890, the said circuit court made a final decree in said cause affirming the said decree of the district court and dismissing the libel of your petitioner with costs; which said decree of the said circuit court is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore this appellant appeals from the whole of the said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the decree of the said circuit court and the libel, answer, pleadings, depositions, evidences, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed and a decree made awarding libellants its damages or such other decree as to the Supreme Court shall seem just.

Dated October 8th, 1890.

SIDNEY CHUBB,
Proctor for Lib'ts & App'ts.

Allowed.
E. HENRY LACOMBE.

(Endorsed:) U. S. Supreme Court. The F. O. Matthiesen & Wiechers Sugar Refining Company *vs.* The Steamship "Ludvig Holberg," her engines, &c.; Christopher Kahrs *et al.*, cl'm'ts. Petition on appeal. Sidney Chubb, proctor for lib'ts, 50 Wall St., N. Y. city. Due & timely service of a copy of within petition of appeal is hereby admitted. Oct. 8, 1890. Wing, Shoudy & Putnam, proctors for appellees. U. S. circuit court. Filed Oct. 8, 1890. John A. Shields, clerk.

117 At a stated term of the circuit court of the United States within and for the southern district of New York, held at the court-rooms, in the post-office building, in the city of New York, on the 8th day of October, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY
vs.
THE STEAMSHIP "LUDVIG HOLBERG," &c.

The above-named libellant having applied to the circuit judge to fix the amount of security for all costs to be given by said libellant on its appeal to the Supreme Court of the United States from the final decree herein: Now, after hearing George A. Black, Esq., of counsel for libellant, and —— ——, Esq., proctor for claimants, and on motion of Sidney Chubb, Esq., proctor for libellants, it is—

Ordered that the amount of the security for all costs to be given by said libellants on their appeal to the Supreme Court from the

final decree herein be, and the same hereby is, fixed at the sum of one hundred and fifty dollars.

And it is further—

Ordered that the libellant have leave to deposit in the registry of this court the sum of one hundred and fifty dollars in lieu of a bond on appeal for that amount, and that upon making such deposit the same shall be deemed sufficient security for all costs on said appeal.

(S'g'd) E. HENRY LACOMBE.

118 (Endorsed:) U. S. circuit court. The F. O. Matthiesen & Wiechers Sugar Refining Company *vs.* The S.S. Ludvig Holberg. Order for deposit of security on appeal. Sidney Chubb, proc. — lib'ft. U. S. circuit court. Filed Oct. 8, 1890. John A. Shields, clerk.

119 Circuit Court of the United States for the Southern District of New York.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINING COMPANY
vs.
THE STEAMSHIP "LUDVIG HOLBERG," &c. } No. 868.

Received, New York, Oct. 8th, 1890, from George A. Black, proctor for libellant, the sum of one hundred and fifty $\frac{00}{100}$ dollars, the same to be deposited in the registry of the circuit court of the United States for the southern district of New York as security for costs on appeal to U. S. Sup. Ct per order of said court filed and entered Oct. 8th, 1890.

$150.00.

[SEAL.] (S'g'd) JOHN A. SHIELDS, *Clerk.*

120 Circuit Court of the United States, Southern District of New York.

THE F. O. MATTHIESSEN AND WIECHERS SUGAR REFINING COMPANY, Libellant and Appellant,
vs.
THE NORWEGIAN STEAMSHIP "LUDVIG HOLBERG," HER ENGINES, &c., Impleaded; Christopher Kahrs *et al.*, Claimants and Appellees.

It is hereby stipulated and agreed by and between the proctors for the respective parties to the above-entitled cause that the foregoing may constitute the record to be certified by the clerk of this court on appeal to the Supreme Court of the United States.

SIDNEY CHUBB,
Proctor for Libellant and Appellant.
WING, SHOUDY & PUTNAM,
Proctors for Claimants and Appellees.

Dated New York, April 23rd, 1891.

Endorsed: Circuit court of the United States for the southern district of New York. The F. O. Matthiesen & Wiechers Sugar Refining Company, libellant & appellant, *vs.* The Norwegian Steamship "Ludvig Holberg," her engines, &c., impleaded; Christopher Kahrs *et al.*, claimants and appellees. Stipulation. U. S. circuit court. Filed Apr. 24, 1891. John A. Shields, clerk.

121 At a stated term of the circuit court of the United States within and for the southern district of New York, held at the court-rooms, in the post-office building, in the city of New York, on the 8th day of October, 1890.

Present: Hon. E. Henry Lacombe, circuit court.

THE F. O. MATTHIESSEN AND WIECHERS SUGAR REFINING COMPANY, Libellant and Appellant,
vs.
THE NORWEGIAN STEAMSHIP "LUDVIG HOLBERG," HER ENGINES, &c., Impleaded; Christopher Kahrs *et al.*, Claimants and Appellees.

By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Christopher Kahrs and others, claimants of the steamship "Ludvig Holberg," her engines, etc.:

Whereas the F. O. Matthiessen and Wiechers Sugar Refining Company, libellant, has lately appealed to the Supreme Court of the United States from the decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, the said Christopher Kahrs and others, claimants, dismissing the libel of the said F. O. Matthiessen and Wiechers Sugar Refining Company against the steamship "Ludvig Holberg," her engines, &c., and has filed the
122 security required by law: You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1890, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 8th day of October, in the year of our Lord one thousand eight hundred and ninety.

E. HENRY LACOMBE.

Endorsed: U. S. circuit court, southern district of New York. The F. O. Matthiesen & Wiechers Sugar Refining Company *vs.* The Steamship "Ludvig Holberg," her engines, &c.; Christopher Kahrs *et al.*, cl'm'ts. Citation. Sidney Chubb, proctor for lib'ts, 50 Wall St., N. Y. city. Due & timely service of a copy of within citation hereby admitted. Oct. 8, 1890. Wing, Shoudy & Putnam, proctors for appellees. U. S. circuit court. Filed Oct. 8, 1890. John A. Shields, clerk.

123 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 122, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The F. O. Matthiesen and Wiechers Sugar Refining Company, libellants and appellants, against The Steamship "Ludvig Holberg," her engines, etc., Christopher Kahrs, L. D. Kahrs, Christian Kahrs, P. Jebsen, L. Arnesen, G. Grieg, and P. G. Halvorsen, claimants and appellees, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 23rd day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 14,591. S. New York C. C. U. S. No. 136. The F. O. Matthiessen and Wiechers Sugar Refining Company, appellant, *vs.* The Steamship "Ludvig Holberg," &c.; Christopher Kahrs *et al.*, claimants. Filed April 25, 1891.

Office Supreme Court, U. S.
FILED
NOV 19 1894
JAMES H. McKENNEY,
Clerk.

Supreme Court

Of the United States.

The F. O. Matthiessen and Wiechiers Sugar Refining Co.,

Libellant and Appellant,

vs. No. 136.

The Steamship Ludvig Holberg: Christopher Kars et al.,

Claimants and Appellees.

Brief for Libellant.

GEORGE A. BLACK,

Of Counsel.

Office Supreme Court, U. S.
FILED
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Supreme Court

Of the United States.

The F. O. Matthiessen and Wiechiers Sugar Refining Co.,

Libellant and Appellant,

vs. No. 136.

The Steamship Ludvig Holberg:
Christopher Kars et al.,

Claimants and Appellees.

Brief for Libellant.

GEORGE A. BLACK,
Of Counsel.

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Supreme Court of the United States.

The F. O. Matthiessen and Wiechers Sugar Refining Company,
Libellant and Appellant,

vs.

The S. S. Ludvig Holberg, Christopher Kars, *et al.*,
Claimants and Appellees.

No. 136.

BRIEF FOR SUGAR COMPANY.

Preliminary Statement.

Libellant has been twice defeated; once in the District Court, (36 F. R., 914), and once in the Circuit (43 F. R., 117), and the intelligent jurist of the twenty-fifth century will wonder in the words of "Truthful James,"

"Can such things be?"
(See Bret Harte's "Heathen Chinee.")

Brown, *J.* (p. 62).

"The general narrative of the "steamer's witnesses is in the main "straightforward, intelligible and "**consistent.**"

* * "Their evidence **is in no way** "**impeached.**"

Lacombe, *J.* (p. 66).

"In so doing," (*i. e., affirming*), "the evidence of those on the Holberg "must be in part accepted and **in** "**part discredited**—either the fog "prevailed for a time much less than "they say it did, or she ran full speed "for some time after it shut in. It "is, however, *natural to expect* that a "witness who is testifying to the "density of the fog, or the duration "of a period of reduced speed, when "the fog or reduction of speed is sup- "posed by him to help his side of the "case, will **exaggerate** his estimate "in both particulars. That his narra- "tive thereby becomes **inconsistent,** "*is not of itself sufficient to require* "*its entire rejection.*"

Brown, *J.*, says the witnesses of the Holberg were "*straightforward*," and their story was "*consistent*," and so he dismissed the libel.

Lacombe, *J.*, says these same witnesses are "*discredited*" have "*exaggerated*" and their story is "*inconsistent*," and, as a result, that their evidence must be "*partially* rejected" (p. 66); and yet, because Judge Brown saw **SOME** of the witnesses (**but not one of the officers or crew of the Holberg**), his decision was "*therefore*" affirmed (p. 66).

On June 4, 1887, the Sugar Co. filed its libel against the S. S. "Ludvig Holberg" and the tug "Leonard Richards" for **$60,000** damages for the destruction by collision in the **lower bay of New York** of 3,281 baskets of sugar the entire cargo of the bark Quickstep, except 400 baskets saved (Libel, pp. 1 to 3.)

The Bark was a total loss. The tug escaped from the jurisdiction, but was afterwards libelled in New Jersey and was held in fault by Butler, District Judge (38 F. R., 767) and his decision reversed by the late Mr. Justice Bradley on appeal (43 F. R., 542) whose opinion is printed as **Appendix No. 1** to this brief (see p. 88).

The result of this litigation is so like that of **The Steam tug Enterprise and S. S. Napoleon, 3 Wall, Jr. 58,** and the language of Judge Grier is so quaint, fanciful and expressive that I quote it.

In that case Hitner was the owner of a canal boat loaded with a cargo of iron and the canal boat while in tow of the tug Enterprise was collided with by the S. S. Napoleon, and the iron was lost. Hitner libelled the Napoleon; the tug boat owner took charge of the suit, and the libel was dismissed.

Hitner then libelled the tug and that libel was also dismissed.

Judge Grier (p. 61), said: "The libellant who has lost his "iron, without any fault of his own *and who should have noth-*"*ing to stake in the game, has been compelled to play the cards* "*of both parties in succession, and has lost the second game* "*with what was the winning card in the first.* The case is "obviously **peculiar.**"

"Oh! that mine adversary had written a book."
(Job, Chap. 31, v. 35.)

LOGIC.

"The City of New York," 15 F. R., 631:

BROWN, *J.*, p. 631: "The story of "the mate, as to the course of the "bark previous to the collision, must, "for these various reasons, be **re-"jected** as wholly **incredible** in "itself and irreconcilable with his tes-"timony and that of others in regard "to the lights. * * **Nor has the "Court any right, if it find's the "mate's statement false as to "the alleged change of course "at 8:15, to SUBSTITUTE "some other time between "8:15 and the collision, when "such a change might have "been made.**"

Page 633: "The mate's testimony as "to the alleged change of course at "8:15, I must therefore **reject,** as I "have said, because it involves the "most violent **improbabilities** as "to the previous navigation of the "bark and is wholly **irreconcilable** "with other accredited facts."

"I have no right to SUBSTI-"TUTE any later change in "place of the one testified to "at 8:15 P. M., and hence I "must hold," etc.

"WHAT IS IT?"

"The Ludvig Holberg," 43 F. R., 117:

LACOMBE, *J.*: "Some of the wit-"nesses who testified on this branch "of the case were examined before the "District Judge. His decision, **there-"fore,** is affirmed."

"In doing so, the evidence of "those on the Holberg must be "in part accepted, and in part "discredited; either the fog pre-"vailed for a time much less than "they say it did, **or she ran FULL "SPEED for some time after it "shut in.**"

"It is, however, **natural** to expect "that a witness, who is testifying to the "density of a fog or the **duration** "of a period of reduced speed, when "the fog or reduction of speed is sup-"posed by him to help his side of the "case, will **exaggerate** his estimate "in both particulars. **That his nar-"rative thereby becomes in-"consistent,** is not of itself sufficient "to require its entire rejection."

Ward *vs.* **Chamberlain,** 21 How., 562: Clifford, *J.*: "**Rejecting** * as *incredible*, because *inconsistent* with the "admitted and well established facts in the case, *we are left "without any satisfactory testimony in the record*, from which "the precise course of the propeller for one or two hours before "the collision can be ascertained with any reasonable degree of "certainty."

* Judge Clifford didn't accept part and *manufacture* some more, but rejected absolutely.

Statement.

The Sugar Co. owned the cargo of 1,024 tons of sugar, laden on the bark Quickstep (1st and 3d Fdgs., pp. 50 and 51) which was nearly all lost, when she sank, about one-quarter of a mile below buoy **No. 11,** on the West bank, after colliding with the Norwegian iron screw S.S. Ludvig Holberg, at **4:26** P. M., on May 24, 1887 (2d Fdg., p. 50).

The bark was being towed from sea to New York by the tug Leonard Richards, on a hawser about 80 fathoms long (2d Fdg.).

"While proceeding up **about the middle** of the ship "channel, and when a **little** to the southward and eastward of "buoy No. 11, at about **4:26** P. M., she was run into by the "S.S. Ludvig Holberg, the latter vessel striking the bark about "the mizzen-topmast backstay, **cutting into her com-"panion-door, a distance of about nine feet, cut-"ting her open so that the cargo rolled out"** "(2d Fdg., p. 50). The steamer was light and was bound from "New York to Barracoa for fruit (4th Fdg., p. 51)."

The bark drew 20 feet of water (3d Finding, p. 51), the steamer drew 13 feet (4th Finding, p. 51). The steamer was 200 feet long (4th Finding), the bark was 170 feet long (3d Finding).

"**The wind was southerly, blowing a stiff "breeze**" (6th Finding, p. 51). "At the time and place of "collision there was *so much fog* as to prevent vessels from be-"ing visible to each other for more than a short distance (esti-"mated by the witnesses from the Holberg at between 200 and "300 feet)" (7th Finding, p. 51). This fog had prevailed be-"tween the Narrows and buoy **No. 11**" (7th Finding, p. 51).

The Holberg heard one blast *right ahead* then another "a "*little more* on the starboard bow."* "Both these were blown "by the tug *which was not at that time visible, through the "fog,* to those on board the Holberg" (10th Finding, p. 52).

Almost *immediately* after, the tug came in sight, only a *few* hundred feet† off, and a *little* on the steamer's starboard bow,

* The Court will observe the irrelevant "*more*."

† The Holberg's witnesses estimated between 200 and 300 feet (7th Finding, p. 51) or about her length (4th Finding, p. 51).

and gave a signal of two blasts (11th Finding). The steamer starboarded, and passed the tug starboard to starboard, *clearing her* **about 30 feet** (13th Finding, p. 52).

> **Note 1.**—With all the starboarding of the steamer, which then had the tug a *little* on her starboard side, she only cleared her by 30 feet. How close they must have been, or rather, how nearly ahead the tug must have been, and how small was the steamer's change to port, is thus shown.
>
> **Note 2.**—*The steamer did not stop when she heard the whistle right ahead.* She did not then know that it was the whistle of a tug—or in which direction it was moving.

Then, for the first time, the Ludvig Holberg became aware of the presence of the Quickstep (14th Finding, p. 52) and after striking the hawser, which parted, she cut into the bark (17th Finding, p. 52).

" The steamer stopped and reversed as soon " as she saw that the tug had a vessel in tow, " BUT NOT BEFORE " (18th Finding, p. 52.)

> **Note.**—The towing hawser was 480 feet long (2d Finding), and the steamer was under such headway that *she cut into the bark* **and her cargo,** *a distance of about 9 feet, so that the cargo rolled out* (2d Finding).

Capt. Busch, her master, says: " Supposing she was going 3 " knots an hour, she would stop dead in the water in *about* " *half a minute*" (p. 37, 58).

The steamer was not damaged (Mate Busch, p. 29).

The Sugar Co. set forth in their libel (Art. 5, p. 2) the navigation of the vessels and the faults of the steamship and tug (Art. 6, p. 3).

The claimants of the Holberg filed their answer to the libel on Aug. 4, 1887 (p. 4), **after** nearly all the depositions had been taken, but on demand, made a statement of their denials and defenses before examining *their* witnesses (see p. 24).

The owners of the bark also filed a libel and both cases were tried together (pp. 50 and 60).

THE ISSUES.

Libel (p. 2).	**Answer** (p. 5).
Weather moderately clear (Art. 5).	Fog, **dense** (Art. 8).
Tide about half flood (Art. 5).	Tide, flood (Art. 8).
Steamship proceeding at too high and excessive a rate of speed (Art. 6).	Speed of 3½ to 4 knots an hour; 20 to 25 revolutions a minute (Art. 8).
Holberg had tug and bark on her starboard bow (Art. 5).	*A whistle was heard nearly ahead* and slightly on the starboard bow, and directly afterwards a tugboat was seen close to the Ludvig Holberg, between two and three hundred feet off and bearing between half a point and a point on steamer's starboard bow (Art. 8).
Tug blew two whistles. No answer.	
Tug blew one whistle. Answer, one whistle.	A whistle was heard nearly ahead.
Holberg blew two whistles. Tug answered with two whistles. (Art. 5).	Tug blew two whistles. Holberg answered with two (Art. 8).
Steamship came on at a high and excessive rate of speed and did not shift her helm in time to pass in safety, and did not stop in time and reverse her engine, and having the tug on her starboard bow did not keep out of the way (Art. 6).	Denied (Art. 4).

ASSIGNMENT OF ERRORS.

The record contains "all of the evidence pertinent to the exceptions" (p. 8, *14;* p. 59, *99*).

Libellant excepted as follows:

(**1,** p. 55.) To the **refusal** (p. 54) to **amend** the **2d** Finding (p. 50) as requested (p. 53, **1st**) by stating how far to the eastward and southward of buoy 11 the collision occurred, instead of the expression "a little"—*the uncontradicted evidence* being that it was between 600 and 1,500 feet south of buoy No. 11, and between 1,500 and 3,000 feet to the eastward of it.

(**2,** p. 55.) To so much of the **4th Finding** (p. 51) as finds that the Holberg was properly manned in connection with the finding that she steers by hand and had *one* ordinary seaman at the wheel.

(**3,** p. 55.) To the **refusal** (p. 54) to **amend** the **5th** Finding (p. 51) as requested (p. 53, **4th**) by striking out the word "dead" before slow, twice; the contrary having been proved by uncontradicted evidence.

(**4,** p. 55.) To so much of the **5th Finding** (p. 51) as finds that the Holberg (fog having set in) reduced to half speed and later to dead slow—and that *dead* slow was about 3½ knots an hour—and that she had been running at the latter rate (*i. e.*, dead slow) for a few minutes only, probably not more than four or five before the collision.

(**5,** p. 56.) To the **refusal** (p. 54) to **amend** the **6th** Finding (p. 51) as requested (p. 53, **5th**) by striking out "*between 3.27 and*," on the ground that it was conclusively proved that the Holberg was off Bedloes Island *after* 3.32 P. M.

(**6,** p. 56.) To the refusal (p. 54) to **amend** the **6th** Finding (p. 51) as requested (p. 53, **6th**) by striking out the words "*a little over three and one eighth knots*" and inserting 3⅜ knots, or by indicating how much over 3½ knots is intended by the expression "*a little over*," on the ground that it was conclusively proved by uncontradicted evidence that the place of collision was between 600 and 1,500 feet below buoy No. 11, and was between 3¼ and 3⅝ knots from Fort Lafayette.

(**7,** p. 56.) To so much of the **6th Finding** (p. 51) as finds that it was **"nearly 4 o'clock when the Holberg "reached Fort Lafayette,"** on the ground that it was conclusively proved by uncontradicted evidence that it was **after 4 o'clock** and that it was about 4.05 P. M. when she reached Fort Lafayette; and that such finding of the exact time was material to the determination of the cause.

(**8,** p. 56.) To the **refusal** (p. 54) to **amend** the **7th** Finding (p. 51) as requested (p. 53, **8th**), by inserting the word "*dense*" before the word "*fog*" in the sentence "*There was so much fog as to prevent vessels*, etc.," on the ground that the same was conclusively proved by uncontradicted evidence, and was admitted by the claimants in their **5th** proposed Finding (p. 49).

(**9,** p. 56.) To the **refusal** (p. 55) to **amend** the **7th** Finding (p. 51) as requested (**9th,** p. 53) by striking out the words "*a short distance*" in the sentence "*there was so much "fog as to prevent vessels from being visible to each other for "more than a short distance*" and inserting the words "about 200 feet," or such other distance as the court shall find upon the evidence that the vessels could be seen in the fog; on the ground that the same was material and was conclusively proved by the uncontradicted evidence and was admitted by the claimants in their **5th** proposed Finding (p. 49.)

(**10,** p. 56.) To the **refusal** (p. 55) to **amend** the **7th** Finding (p. 51) as requested (p. 53, **10th**) by inserting the word "*dense*" before the word "fog" in the sentence "*This fog "had prevailed between the Narrows and buoy 11,*" on the ground that the same was material and was conclusively proved by uncontradicted evidence.

(**11,** p. 56.) To the **refusal** (p. 54) to **amend** the **7th** finding (p. 51) as requested (p. 53, **11th**) by striking out the word "*fifteen*" in the sentence "*This fog prevailed between the "Narrows and buoy No. 11 during a period of at least 15 "minutes before the collision*" and inserting the word **"twenty,"** on the ground that the same was material and was conclusively proved and is established by the other findings.

(**12,** p. 56.) To the **refusal** (p. 54) to **amend** the **8th** Finding (p. 52) as requested (p. 53, **12th**) by striking out the words "*about the time*" and inserting in place thereof, the word "*before*" in the sentence "*The Ludvig Holberg ran into the "fog about the time she passed the forts,*" on the ground that the same was material and conclusively proved and *is admitted by claimants' answer* (p. 5).

(**13,** p. 56.) **To so much of the 8th FINDING** (p. 54) **as finds that the Holberg reduced her speed "below the forts" on the ground that the contrary is established by conclusive evidence and by the other findings of time and distance.**

(**14,** p. 56.) To so much of the **8th Finding** (p. 54) as finds that the Holberg reduced her speed to *half speed*, and further reduced about buoy 13.

(**15,** p. 56.) To the **refusal** (p. 54) to **amend** the **8th** Finding (p. 52) as requested (p. 53, **13th**) by specifying *how much below the forts* the Ludvig Holberg had got before she reduced her speed in place of the expression "*some distance*," on the ground that the same was material.

(**16,** p. 57.) To the **refusal** (p. 54) to **amend** the **9th** Finding (p. 52) as requested (p. 53, **14th**) by indicating how much below buoy No. 13 the Holberg had got when she slowed down to about 4 knots, in place of the expression "*a little below*," on the ground that the same is material.

(**17**, p. 57.) To so much of the **9th Finding** as finds that the Holberg *had slowed down* to about four knots over the ground by the time she had reached a point a little below buoy No. 13, on the ground that such finding is material and that the same is contrary to the conclusive evidence in the case and to the other findings.

(**18,** p. 57.) To so much of the **9th Finding** (p. 52) as finds that the Holberg did not increase her speed from that point (*i. e.*, a little below buoy No. 13) to the place of collision, on the ground that such finding is material and contrary to the conclusive evidence in the case and to the other findings

(**19,** p. 57.) To the **refusal** (p. 54) to **amend** the **11th** Finding (p. 52) as requested (p. 53, **15th**) by specifying how many hundred feet off, or about how many feet off the tug was when she first came in sight, in place of the expression "*only a* **few** *hundred feet off*" (p. 52).

(**21,** p. 57.) To the **refusal** (p. 54) to **amend** the **13th** Finding (p. 52) as requested (p. 54, **16th**) by stating that the steamer starboarded about "*one point*," on the ground that the same is material and is established by uncontradicted evidence.

(**22,** p. 57.) To the **refusal** (p. 54) to **amend** the **13th** Finding (p. 52) as requested (p. 54, **17th**) by adding thereto, "*by reason of the tug at the same time taking a rank sheer to port*," on the ground that the same is material and conclusively proved by uncontradicted evidence.

(**23,** p. 57.) To the **refusal** (p. 54) to **amend** the **14th** Finding (p. 52) as requested (p. 54, **18th**) by inserting after the words "*The Quickstep * * was not following directly after the tug, but to starboard of her*" the words, "*in obedience to his single whistle.*"

(**24,** p. 57.) To the **16th Finding** (p. 52) as immaterial, inasmuch as it is not found that there was time in which to cast off the hawser.

(**25,** p. 57.) To so much of the **18th Finding** as finds that the Holberg was nearly stopped at the time of the collision, on the ground that the contrary is conclusively established by the evidence.

(**26,** p. 57.) To the **19th Finding** (p. 52) as immaterial and not supported by the evidence, inasmuch as it was proved that it was not the starboarding of the Holberg which prevented the collision with the tug, but the rank sheering of the tug which got her out of the Holberg's path.

(**27,** p. 57.) To the refusal (p. 54) to make the additional finding, and conclusion of law as requested (p. 54, **20th.**)

(**28,** p. 58). To the **1st Conclusion of Law** (p. 52) *that the collision was not due to the fault of the Holberg.*

(**29,** p. 58.) **To the 2d Conclusion of Law** (p. 52) that the libel of the Sugar Company be dismissed.

(**30,** p. 58.) To that part of the **opinion** (p. 66) which states that "some of the witnesses who testified on this branch of the "case were examined before the district judge. His decision, "therefore, is affirmed."

(**31,** p. 58.) To the **refusal** to find that part of libellant's **second proposed finding** (p. 49) which states that the collision happened about a quarter of a mile to the southward and eastward of buoy No. 11. On the ground that said finding was material and was conclusively established.

(**32,** p. 58.) To the **refusal** to find that part of libellant's **fifth proposed finding** (p. 49) which states "*the Steamship (Holberg) reached Fort Lafayette about 4.05.*"

(**33,** p. 58). To the refusal to find that part of libellant's **fifth proposed finding** which states that **"the distance "from the forts to the place of collision is 3⅜ "knots"** on the ground that the same is material and conclusively proved.

(**34,** p. 58). To the refusal to find that part of libellant's **fifth proposed finding** (p. 49) which states **that the**

steamship ran the 3⅜ knots in 21 minutes or at the rate of about 9 knots an hour over the ground, on the ground that the same was material and conclusively established.

(**35,** p. 58.) To the **refusal** to find that part of libellant's **4th proposed finding** (p. 49) which states that **"just before the collision the Holberg was running at the rate of about 9 knots an hour"** on the ground that the same was material and was conclusively proved.

(**36,** p. 58.) To the **refusal** to find that part of libellant's **9th proposed finding** (p. 50) which states the Holberg was not properly navigated, in not having competent men at the wheel, on the ground that the same was material and was conclusively proved.

(**37,** p. 58.) To the **refusal** to find the libellant's **10th proposed finding** which states that:

"The Holberg did not take seasonable and proper precau-
" tions to avoid the collision" (p. 50).

"She did not change her course in time or sufficiently to keep
" out of the way of the tug and bark" (p. 50).

"She did not conform to the whistles which were blown by
" the tug" (p. 50).

"She was proceeding at an immoderate rate of speed in the
" channel" (p. 50).

"She did not stop and reverse her engines until the collision became imminent."

"And took no steps to keep out of the way of the bark" (p.50.) on the ground that the same is material and conclusively proved.

(**38,** p. 58.) To the **refusal** to make the libellant's **second proposed conclusion of law** (p. 50) that "the Holberg
" was in fault for the collision and is liable for the damages
" resulting therefrom."

POINTS.

Preliminary Observations.

1st Observation. The tug Leonard Richards has been held, by one of the most able *admiralty* judges, to be free of fault (43 F. R., 542). The steamship Ludvig Holberg, has also been held free of fault by Judges Brown and Lacombe. By the logical process of exclusion, the sole fault rests upon the *helpless* bark Quickstep and her cargo (*if these decisions are right!*).

2d Observation. That the cargo is free of fault is manifest; and if the Holberg was in any degree in fault, the cargo owner is entitled to recover the entire loss from her.

3d Observation. No discussion of the faults of the tug or bark is relevant or material, except as demonstration of the *freedom of fault* of the Holberg.

4th Observation. Although the District and Circuit Courts reached the same result in holding the Holberg free of fault, yet the grounds of Judge Brown's decision were demonstrated to be untenable, and the Circuit Judge was *driven to manufacture* a story for the Holberg, which totally ignored the evidence her witnesses gave, and to adopt (in defiance of the decisions of this Court) a ground of decision which has no legal existence. I refer to that part of his opinion where he says: "**Some** of the witnesses who testified on this branch of the "the case were examined before the District Judge. His deci- "sion, *therefore*, is affirmed" (p. 66).

The Differences Between the Judges.

Judge Brown.

(**1**) Collision about 4:25 p. m. (p. 60).

(**2**) Collision very near the westerly side (p. 61).

(**3**) The Holberg was off Bedloe's Island at about 3:25 p. m. (p. 63).

(**4**) The Holberg had probably been running slow *about 5 minutes* before the collision (p. 63).

Judge Lacombe.

(**1**) Collision about 4:26 p. m. (1st Fdg., p. 50).

(**2**) Collision while Q. proceeding up about in middle of main ship channel (2d Fdg., p. 50).

(**3**) The Holberg was off Bedloe's Island between 3:27 and 3:32 p. m. (6th Fdg., p. 51).

(**4**) "By the time she reached a point "a little below buoy No. 13 she had "slowed down to about *4 knots over the* "*ground*. From that point to the place "of collision, *a distance of about 4,500* "*feet* she did not increase her speed" (9th Fdg., p. 52).

Note.—4 knots an hour is 400 feet a minute, and to run 4,500 feet at that rate takes $11\frac{1}{4}$ minutes.

(5) The Holberg had probably been running at half speed, viz.: $6\frac{1}{2}$ to 7 knots from **below** Craven's Shoals, as the pilot first stated, for some ten minutes preceding (p. 63).

Note 1.—Judge Brown untruly stated the pilot's evidence; he said nothing about "*below*" Craven's Shoals, and he retracted what he had said. See p. 42, where he testified: "Q. *Abreast* of what "point were you, about, when you "slowed her to half speed? A. Craven's "Shoals."

"Abreast" is distorted into "below."

See page 44, where he says the order to go at half speed was given at not over a quarter of a mile **North** of a line drawn from Fort Lafayette to Fort Wadsworth.

Note 2.—The Holberg would run 7,000 feet in 10 minutes at half speed, and 2,000 feet in 5 minutes at 400 feet a minute. But it is 11,780 feet from Craven's Shoals to buoy No. 11.

(6) The Holberg had the benefit of the outward current **all the way** *at the average rate of about a knot an hour* (p. 63).

(7) "Unless they (the crew of the Hol- "berg) did reduce their speed first to "half speed and next to slow, their "narrative is a sheer fabrication. * * "*Their evidence is in no way impeached*" (p. 62).

(8) That the Holberg passed at a safe distance from the tug, starboard to starboard (p. 61).

(5) "The Holberg did not reduce her "speed until she had run *some distance* "below the fort" (8th Fdg., p. 52).

Note.—The beautiful indefiniteness of "*some distance*" was necessary to avoid the fatal blunder of Judge Brown.

"Then she reduced to half speed only" (8th Fdg., p. 52).

(6) "The Holberg carried the ebb tide "with her from Bedloe's Island to **a lit- "tle below the forts.**

"*After a brief period of slack water* and "until the collision there was a flood "tide. It helped a vessel going out "about **half a knot** an hour" (6th Fdg., fol. 51).

(7) "In doing so (*i. e.* affirming) the "evidence of those on the Holberg must "be in part accepted and in part *dis- "credited*. Either the fog prevailed for "a time much less than they said it did, "or she ran full speed for some time "after it shut in."

(8) The Holberg passed the tug starboard to starboard, clearing her about **30 feet** (13th Fdg., p. 52).

Judge Lacombe's Inconsistencies.

(1) Dead slow 3½ knots. "She had "been running at the latter rate for a "few minutes only, *probably not more "than 4 or 5 before the collision*" (5th Fdg., p. 51).

Note.—The appellant is entitled to the benefit of the finding most favorable to it.

Bonnell *vs.* Griswold, 89 N. Y., 122.

(1) "By the time she reached a point "a little below buoy No. 13 she had "slowed down to about 4 knots, *over "the ground.* From that point to the "place of collision, *a distance of 4,500 "feet*, she did not increase her speed" (9th Fdg., p. 52).

Queer Mathematics.—4 knots an hour is 400 feet in 1 minute. Q. 400 into 4,500? A. 4 or 5!!

The Sailing Rules.

The collision occurred in the lower bay of New York, in 1887, and is to be judged by R. S., § 4233, Rules 19 and 21.

Rule 19. "If two vessels under steam are crossing *so as to "involve risk* of collision, the vessel which has the other on her "own *starboard* side shall keep out of the way of the other."

Note. The Holberg *heard* the whistle on her starboard side (10th Fdg., p. 52), and *saw* the tug appear on that side (11th Fdg.). The tug saw the whole of the starboard side of the Holberg.

McDavitt, captain of tug (pp. 21 and 23).
Wood, pilot of the Q. (p. 19).
Bradley, *J.* (Appendix No. 1, p. 88).

Rule 21. "Every steam vessel, when approaching another "vessel, *so as to involve risk* of collision, shall slacken her "speed, or if necessary, stop and reverse, and *every steam "vessel shall, when in a fog, go at a moderate speed.*"

Note. This is a *double* rule, and both branches of it apply to this case, and the Holberg violated both provisions.

She was approaching.
She did not *slacken* her speed.
She did not go at a *moderate* speed in the *dense* fog.

The Law as to Moderate Speed in a Fog.

The Martello, 153 U. S., 70; Brown, *J.*: "While it is "possible that a speed of 6 miles an hour, *even in a dense fog*, "*may not be excessive upon the open ocean* and off the fre-"quented paths of commerce, a different rule applies to a

" steamer *just emerging from the harbor of the largest port on* " *the Atlantic Coast, and in a neighborhood where she is likely* " *to meet vessels approaching the harbor* from at least a dozen " points of the compass. Under such circumstances and *in such* " *a fog that vessels could not be seen more than a quarter of a* " *mile away*, it is not unreasonable to require that she reduce " her speed to the lowest point consistent with a good steerage " way, which the Court finds in this case to be **three** miles an " hour."

Judge Brown then quotes from the City of New York, 147 U. S., 84, as follows: " Upon hearing the fog-horn of the barque " only one *point* on her starboard bow* the officer in charge " should *at once* have checked her speed and if the sound " indicated that the approaching vessel was near† **should** " **have stopped or reversed,** until the sound was defi- " nitely located or the vessels came in sight of each other. * * " There is no such certainty of the exact *position* of a horn blown " in a fog as will justify a steamer in speculating upon the " probability of avoiding it by a change of the helm, without " taking the additional precaution of **stopping,** until its " location is definitely ascertained."

Judge Brown then cites the Kirby Hall, 8 P. D., 71; the John McIntyre, 9 P. D., 135, and the Dordogne, 10 P. D., 6; all of which lay down and reiterate the doctrine that it is the duty of the master of the steamer in a *dense* fog to *reduce* her speed, and when the other vessel has come close, *even though not in sight*, to stop and reverse her engines. I extract from those cases and others as follows:

The **" Resolution,"** 6 Asp. Mar. Cases, 363, BUTT, *J.*: " It is clear that the 'Sesostris' was *going through the water* at the rate of at least **five** knots an hour, and probably more. I know it is said that there was a strong current *against* her and that therefore *she could not otherwise hold her own and keep proper steerage way on her*. That is a proposition with which I do not agree. I could not agree with it even if the current had been nearer four knots, as it was stated, than it really was. But tak-

* The Holberg heard the whistle " *right ahead*," says the 10th Finding.

† Judge Lacombe found (11th Finding, 52), that " almost *immediately* the tug came " in sight only a *few* hundred feet off " (7th Finding) " estimated by the witnesses " from the Holberg at between 200 and 300."

ing it at 2½ knots, I am clear that it does not justify her speed. But whether the speed in itself is justifiable or not, it is perfectly clear to my mind that going at *five* knots an hour through the water, *she ought immediately in the fog to have reduced that speed.* She could have reduced it and still had steerage way. I know it is said, and nearly always said in these cases, that large steamers cannot go below a certain rate, because, apart from the question of steerage way, the revolutions would be so slow that the engines would stop on the centre. It is not now suggested that this was the case with the "Sesostris," because, *according to her engineer's evidence, he could have worked the engine* **two or three revolutions** *per minute slower than he did.** But if a vessel cannot reduce her speed sufficiently with the *continuous* action of her engines, and therefore cannot go at what would be a reasonable speed in a fog without occasionally stopping her engines, *it is her duty to occasionally stop them.* Masters can always carry out the manœuvre in that way, and I will not yield to what I know is the strong disclination of the masters of these large vessels to stop their engines. They hate and abhor the very idea; but it is to my mind their duty to do so, if they cannot otherwise reduce their speed sufficiently.† I therefore think the "Sesostris" was going considerably too fast (*i. e.*, **2½ knots over the ground**), and that that had a very material effect in bringing about this collision. For that she must be held to blame."

The **Nacoochee,** 28 F. R., 466, WALLACE, *J.*: (137 U. S., 330.) "Such speed only is lawful as will permit the steamer "seasonably and **effectually to avoid a collision** by "slackening speed, or by stopping and reversing *within* the dis- "tance at which an approaching vessel *can be seen.*"

The **Giralamo,** 3 Hagg., 176, Sir JOHN NICHOLL,: "It (the "collision) occurred from the vessel **going on** in the fog. "* * * It seemed to be nearly admitted that if the vessel set "off in this fog, blame would have been imputable to the master. "If so, *was he not blameable in going on in the fog.*"

In the **"Kirby Hall,"** 8 P. D., 71, Sir R. PHILLIMORE says, p. 77:

"There was a *dense* fog at the time; *as dense a fog as one can*

* The "Holberg" was running five turns of her screw faster than she needed to in the *dense* fog—if her story is believed. (See p. 61 of this brief.)

† Quoted by Judge H. B. Brown in the North Star, 43 F. R., p. 809.

"*well imagine*, according to the account given on both sides, and "I think the doctrine laid down in the case of the "Frankland," "L. R., 4 P. C., 529, is one which covers the present case, and "upon the principles of which the present case must be decided."

In the case of the "**Frankland**" the Privy Council say (p. 534):

"Their Lordships * * * understand the finding to have "been confined to the circumstances of the case, and those cir- "cumstances they understand, in the opinion of the Court, to "have been, as far as the 'Frankland' is concerned: That she "was navigating in a fog at a *moderate* speed; that she heard a "whistle sounded many times, *indicating that a steamer was* "*approaching her and had come very near to her*—so near in- "deed, that if the vessels had then stopped they would have "been within hailing distance; *that at that point of time it was* "*necessary for the captain of the 'Frankland,' under the* "*terms of the rule, not only to stop the motion of the engines* "**but to reverse them,** *so as to stop the motion of the* "*vessel, and that he ought not to have waited till the vessels* "*sighted each other*, when such a manœuvre would have been too "late."

"That being the view which their Lordships take of the deci- "sion of the Court of Admiralty, they are of opinion that it is "right."

In the "**Kirby Hall**" the facts were that when she heard the whistle of the "City of Brussels" her engines were working *dead slow*, she replied with her whistle, and the whistle of the C. of B. was heard again, *closer on the port bow*; the engine of the K. H. was then immediately *stopped* (not reversed), and her helm ported when the white light of the C. of B. was seen, from one to two ship's lengths away, and then the engine of the K. H. was immediately *reversed* full speed astern, and upon these facts Sir Robert Phillimore said (p. 78):

"We have arrived without hesitation at the conclusion that the "Kirby Hall was solely to blame **by reason of not stop- "ping her way on the water when the whistle "of the 'City of Brussels' was heard the first "time**, instead of going ahead without knowing where the "City of Brussels was or what she was doing, and *we wish to* "*state with as much emphasis as possible, that those in charge*

"*of a ship in such a* **dense** *fog as was described in this case* "*should never conjecture anything when they hear a whistle in* "*such close proximity as was the case here*, whether the sound "appears to them to come from a vessel approaching them or "not. **In the dense fog which is proved to have "prevailed in this case, those on board the "'Kirby Hall' were bound not to speculate, but "to bring their vessel to a STANDSTILL on the "water at once.**"

In the case of the "**John McIntyre**" (9 P. D., 136) in the Court of Appeals, BRETT, L. J., says: "The ships were ap- "proaching in a *thick* fog and it was the duty of the 'John "McIntyre' to keep her course. The sound of the whistle of "the 'Monica' made it clear to the 'John McIntyre' that she "was approaching a steamship. *When the first whistle from* "*the 'Monica' was heard the officer knew that he was not in* "*such a position as to her that his own ship could be absolutely* "*safe*. Still at the time of the first whistle on the port bow "he was not perhaps bound to stop and reverse. But he heard "another and another whistle. These did not seem to show that "the vessel sounding them was getting farther ahead or broader "on the bow; the inference, therefore, should clearly have been "drawn that the 'Monica' was *approaching* his bow. It may "be laid down as a general rule of conduct that *it is necessary* "*to stop and reverse*, not indeed every time that a steamer hears "a whistle or fog-horn in a dense fog, but, *when in such a fog* "*it is heard on either bow and approaching, and is in the* "*vicinity, because then there must be a* **risk** *of collision*."

In the case of the "**Dordogne**" (10 P. D., 6) in the Court of Appeals, the "Frankland" and the "Kirby Hall" were referred to, and followed by BUTT, *J.*

In that case the "Dordogne" *was going ahead from three and a half to four knots an hour* (p. 7) (**dead slow**) in a dense fog, and a whistle was heard *three* points on the starboard bow; *the engines were stopped*, and the whistle again heard *broader* on the starboard bow, replied to, and the engines again set ahead, *again stopped and again ahead*, when the "Edith" appeared crossing the bows of the "Dordogne" from starboard to port, about a ship's length away, and then the "Dordogne's" helm was put hard a-port and her engines *full speed astern*.

BUTT, *J.*, says (p. 8): "We think **both of these vessels "ought to have brought themselves to a stand-"still,** or much nearer to a standstill, not at the first sounding "of the steam-whistles, but within some time during those ten "or fifteen minutes that they were approaching one another."

BRETT, *J.*, on the appeal says (p. 10): "**The fog was so "dense that the officer could not see another "vessel until she was a ship's length from his "ship; in other words, the fog was so dense "that it was impossible to see another ship "until a collision was inevitable.**"

He then distinguished between vessels navigating in narrow waters –a river, or an arm of the sea, where vessels would be likely to meet, and says:

"Therefore, in the Thames, for example, *before* a whistle is "heard, I think that a vessel in a dense fog should be brought "as nearly as possible to a standstill so as only to be just under "command."

He then considers the English articles 13 and 18; 13 being the requirement as to going at a moderate rate in a fog, and 18 as to vessels approaching so as to involve risk of collision, and held that the "Dordogne" broke both of them.

In the case of the "**Ebor**" (11 P. D., 25) decided in 1886, the "Ebor" admitted being in fault. The "Telesilla" was also held to blame and appealed. The "Telesilla" was going about *three* knots over the ground, her engines going slow; the officers in charge of the "Telesilla" heard a whistle *practically ahead*, very slightly on the port bow; within a minute the whistle was heard again louder and *nearer*, a very little on the port bow, and immediately after the "Ebor" came in sight on the port bow about two ship's lengths off. *When the second whistle of the "Ebor" was heard the order was given to stop and reverse instantly.*

This case affirms the doctrine of the "Dordogne" and LORD ESHER refers to the case of a vessel going through narrow waters where she would be likely to meet a vessel right ahead, and states that she ought to have only just enough way on her to keep her steerage way. He says (p. 27): "If the whistle is "**ahead** it then becomes necessary to take extreme precau-"tions, for every half minute is bringing the two vessels closer "together, and is causing a probability of danger. When the

"whistle sounds **ahead**, the person in charge of the vessel "which hears it should act sooner than if the whistle is heard "from any other quarter."

(P. 29.) "The Regulations, as we have repeatedly pointed "out, are not only made to prevent collisions, but **to prevent** "**the DANGER of collisions**; they must, therefore, be "construed strictly * * * I should like to exprees myself "so clearly that the most hypercritical should not question "what I now say, that **this was the case of a vessel** "**nearly right ahead** at such a distance that the whistle "showed that, if she were approaching, a position of great dan- "ger must soon be produced, that, therefore, the officer in "charge should have acted *on the probability* of that ship "approaching, even though in fact she was not doing so, "and therefore *he ought to have acted without delay*, and that "because he did not act at once he broke Arts. 13 and 18, with "the consequence that his vessel must be held to blame."

LINDLEY, *L. J.*, agreed that the "Telesilla" did break Art. 18, and LOPES, *L. J.*, concurred.

The Holberg did not stop.

In the **Martello**, Judge Brown further said, (153 U. S., p. 71): "The steamship however had no right to *speculate* upon this con- "tingency (*i. e.*, crossing ahead). Hearing the horn as she did "and being thus apprised of the bearing and course of the "approaching vessel, *being as she must necessarily have been,* "*in doubt as to her distance from the steamship*, it was the "duty of the latter **at once to stop**, until, by repeated blasts "of the horn, she could assure herself of the exact bearing, speed "and course of the approaching vessel. **The necessity of** "**instantly stopping**, or at least of a reduction of speed to "the lowest point consistent with the maintenance of steerage "way, *in the presence of an* **unknown** *danger*, is one which the "masters of steam vessels are slow to appreciate; but the courts "have had occasion to enforce it so often, it can, as a matter of "of law, be no longer considered doubtful."

(Compare the above with the language of Butt, *J.*, in the Resolution, 6 Asp., M. C., 363, extracted from at page 15.)

Judge Lacombe found (10th Finding, p. 52): "While she (the "Holberg) was thus proceeding she heard one blast right ahead, "then another a little more on the starboard bow. Both these "were blown by the tug, which was not at that time visible "through the fog to those on board the Holberg (18th Finding). "The steamer stopped and reversed as soon as she *saw* that the "tug had a vessel in tow, **but not before.**"

Capt. **Busch** of the Holberg testified (p. 38):

"Q. **Why did you not stop when you heard a "whistle exactly ahead or about ahead of "you** * *?

"A. **I didn't think I ought to; we had to go "clear, I thought** * *.

"Q. You could have stopped as well as not, if you'd wanted to?

"A. Yes; of course we could have stopped, but as long as I "was going ahead slow, I thought it was all right. *You could "not see a ship's length off.*"

Pilot **Mapes** of the Holberg said (p. 43): "The first we heard "of this tug was the whistle, *and we didn't know exactly where "it was; we did not know on which bow it was on; we couldn't "see anything of it then; the fog was very thick.*

Mate **Busch** entered on the Holberg's log (p. 28) "A steamer's "whistle was heard *forward*, next blast of whistle was heard a "*little* on starboard bow, and immediately afterwards a tug boat "was seen about half a point on our starboard bow, a good "ship's length off" (*i. e.* 200 feet, 4th Finding, p. 51.)

2d mate **Johnson** of the Holberg testified, p. 25: "I heard "* * a whistle ahead, but *I was not sure* first of it, and "*afterwards*, I heard a whistle and reported it to the bridge; a "steam whistle *ahead*, a little upon the starboard bow."

This failure to stop was an obvious fault, and is covered by libellant's 2d proposed conclusion of law (p. 50) and 38th Exception (p. 58) as well as by the 28th Exception (p. 58) to the court's 1st conclusion of law (p. 52).

See The Fountain City, 62 F. R., 92.

Fabre vs. S. S. Co., 53 Fed. R., 290. (C. C. of Ap.). Wallace, *J.* "Prudent seamanship requires a steam vessel "navigating in a fog—hearing apparently forward of her beam "the fog signal of another vessel, the position of which is not "ascertained, if the circumstances of the case admit, **to stop**

"**her engines,** and then navigate with caution until danger "of collision is over. This rule of conduct was approved by "the international marine conference of 1888, as appears by "Article 18, of the proposed regulations. That article formu- "lates the duty which nautical experience has found it neces- "sary to observe, and which the courts have often declared "obligatory."

Judge Morrow, in the Oceanic, 61 F. R., 355, refers to Fabre *vs.* S. S. Co., and to the article referred to, which is No. 16, and is found at page 786 of the Sup. to R. S., 2d Ed., and is in the following words:

"Every steam vessel, hearing apparently forward of her "beam, the fog whistle of a vessel, *the position of which is* "*not ascertained*, shall, so far as the circumstances of the "case admit, **stop her engines,** and then navigate "with caution until danger of collision is over."

The North Star, 43 F. R., 807. Judge Henry B. Brown (811). "I think it is the duty of a vessel hearing the "signal of a steamship ahead in a fog, and by ahead I do not "mean dead ahead, necessarily, but within one or two points "upon either bow, to reduce her speed; and if she hears a "second and third whistle, nearer in the same direction, *it is* "*her duty to stop and wait* until signals have passed between "the two vessels, which shall determine upon which side each "shall go, and that both vessels shall proceed at the most "moderate speed, keeping themselves well in command until "they bring themselves off each other's bows to such a distance "as to make it absolutely certain that by continuing, *under* "*check*, they will pass each other in safety. * * * * *

THE ATMOSPHERIC CONDITIONS.

Fog banks are not without limits and fog prevails in some places while others are perfectly clear; but there is or may be also a middle ground or *margin of haze* running into fog. It is from overlooking this obvious physical fact that the two judges who dealt with the evidence in this case, failed to find the ready explanation of the apparent contradiction in the testimony—and forgot that the witnesses on the different vessels were testifying

from their standpoint of observation, viz., in a location different from the others.

Judge Bradley clearly recognized this when he said (see his Opinion, Appendix, p. 90): "*Drifts* of fog were coming in from "the sea about that time *and* **some** *vessels were enveloped in* "*fog banks*, occasionally, which made it necessary for them to "slow up."

Judge Brown (p. 61), in considering the different stories as to fog, says: "Upon repeated consideration of this *most embar-* "*rassing* testimony I must find that during a period of *at least* "15 minutes before the collision, there was so much fog between "the Narrows and buoy No. 11 as to prevent vessels being "visible to each other for more than a short distance," * but at p. 63 he got a glimpse of the truth when he said: "Some further explanation of the discrepancies between "the witnesses of the bark and of the Ludvig Holberg may "be found in the fact, *often testified to before me*, that "**objects cannot be distinguished so easily or "so far in looking TOWARDS the fog as in "looking AWAY from it.** The bark's witnesses may "therefore have been able to distinguish the steamer *before* the "latter could distinguish the bark."

If this means that those on the bark and tug were looking *away* from the fog, and those on the L. H. were looking *towards* the fog, it is exactly contrary to what all the witnesses stated.

Bear in mind that Capt. Warren testified that when he left Pier 8, North River, at **3.46**, the weather was thick, *but not dense fog* then; at **4.02** he reached Bay Ridge (39) †, and there ran into *thick* fog (39), and it continued thick *till he passed buoy* **No. 11** at the tail of the West Bank (p. 39).

About abreast or a little below No. **13** he passed a tramp steamer (39) which it is conceded was the Holberg (p. 47), so that he passed the Holberg while she was yet nearly a mile from the place of her collision with the bark, and after passing her, he says: "We came into fog that was not so thick, about three "minutes after we passed buoy No. **11.** * * When right off

* Note that Judge Lacombe has adopted these very words in his 7th Finding, p. 51).

† Bay Ridge *buoy* (p. 41)—that is, No. **18**; see chart, p. 48.

"buoy **11**, I *heard* another whistle directly ahead and closed "our boat down. The *dense fog broke away*—still it was foggy— "*and we could see quite a distance* (39), probably a quarter of "a mile (p. 42). Just as we got slowed down there was a tug- "boat and bark (p. 39).

"I passed a tug and bark in tow just below No. **11.** *We ran* "*out of the dense fog when we were right abreast of the tow*" (42).

It is obvious that when Capt. Warren in the St. John ran out of the dense fog, right abreast of the bark and tug, those on board those vessels were equally "*out of the dense fog*," and told the truth when they so testified.

Two other of claimant's witnesses, Axelsen (p. 47) and Johnson (p. 47), corroborate the above.

The collision happened at 4.26 P.M. (2d Finding, p. 50).

The bark Aristos, Capt. Axelsen, with pilot Johnson in charge (p. 47) was being towed in to New York from sea and at 4.30 P. M. (four minutes after the collision), passed the bark Quickstep, *sinking* (not sunk). At that moment Axelsen could not see the Holberg, but "he saw her *before, when it was a little clearer*, when he was *half a mile away*.

Pilot Johnson, says: "The weather was thick coming up to "buoy No. **8,** when it kind of scaled up: that he could then "see a mile off at about No. **11,** all the upper yards of the other "bark (*i. e.* the Quickstep) quite plain, but not the hull;" that he saw the steamer in to the westward of the bark, quite a distance off, "one (the bark) was *outside of the channel*, and the other "(the steamer) in to the westward, in shallow water." * * "That 'they could only be seen for an instant, five minutes, "and then the fog shut down *thick* again'" (p. 47) * * "that "they saw no more until they passed *right astern* of the bark "*which was then heading in-shore* on their port side; that the "Aristos passed close to her stern, about 15 feet off. **The "Aristos passed her in the centre of the chan- "nel,** and was drawing 17½ feet; *that they could see where the "bark had been cut, could see her stern* hanging off. *A tug- "boat was then hanging close alongside*, and some men were "seen forward, on the bark, **which was not moving at "the time**" (p. 48) * * **"When abreast of the "bark buoy No. 11 bore NORTHWEST from the "Aristos."**

Here were two witnesses *so close, in time, to the collision, that the bark had not sunk yet*, nor had the tug commenced to tow her to her final resting place; who saw her at the distance of nearly 1 mile (*i. e.* from above No. 8 to the place of collision due east of where the bark now lies; see chart); one of whom, Axelsen, fixed the time, when he *passed* the bark, with precision, at 4.30 P. M. or only 4 minutes after the collision.

It is true that neither of these witnesses of **claimants** *were examined in the presence of Judge Brown and that* **he utterly ignored their testimony,** *both as to the condition of the fog, and as to the place of the collision*, of which more will be said hereafter.

I have said (p. 23) that Judge Brown "got a glimpse of the "truth;" in the statement that "objects cannot be distinguished "so easily or so far in looking **towards** the fog, as in look- "ing **away** from it."

The observer located in a dark room can see into the lighted one, but not *vice versa* and the person standing behind a transparent screen or curtain (such as lace or wire gauze) can see through it, and not be seen.

The mistake the Judge made was in the application he made of the physical fact, arising from his misunderstanding of the testimony.

The importance of this mistake lies in the fact that the instant it is recognized, the Holberg is convicted of keeping a bad lookout. She was seen from the tug and bark and as they were looking towards the *denser* fog in which she was enveloped, and she was looking out of it, into the clearer atmosphere she was approaching, she should have seen the tug and bark before they saw her. Judge Bradley found (Appendix, p. 90) "But at "the place where the collision occurred and when it occurred "there was no material obstruction to the view."

The Quickstep's testimony as to seeing the Holberg is as follows: Capt. **Morrison** was below, getting ready for the quarantine visit, and came on deck and saw the Holberg after she had parted the towing hawser (pp. 12 and 13).

Pilot **Wood** saw her when the tug first blew two whistles (19) which the Holberg did not answer, and saw that she went to starboard under a port helm and was then ½ of a mile (2,000 feet) away (20).

Mate **Card** was on the forecastle head (10) supervising unbending sails (11), and saw the Holberg about ½ a point on the Quickstep's port bow, and then stepped down on the main deck to let go the topsail buntline, and when he so stepped down the steamer was right ahead of the tug, about 600 feet away (11), and when he returned to the forecastle the Holberg was still ahead of the tug, not 100 feet off (11).

Second Mate **McCarthy** (10) could see a quarter of a mile *good*, at the time of the collision.

Wheelsman **Larsen** (12) saw the Holberg ¼ of a point on the Quickstep's port bow, and received orders from the pilot as follows: (1) starboard (*i. e.* when tug blew two whistles to Holberg); (2) port (*i. e.* when the tug blew one whistle to the Holberg); (3) starboard (*i. e.* when the Holberg blew two whistles and the tug answered with two whistles); (4) port, when pilot Wood ported so as not to get run into (see p. 19), and (5) starboard, just as the steamer *touched* the hawser (12), to make a glancing blow (Wood, p. 20). *All these changes of the wheel were before the collision and took time, and show that the Holberg was seen at a distance to be measured by that time.*

Wheelsman **Ludden** (11) tells about the same orders, but says the last (*i. e.* (5) starboard) was after the hawser had parted.

Seaman **Vesluys** (p. 9) thought he could see a mile. *He was aloft.*

Seaman **Bartell** (p. 9) could see half to three-quarters of a mile. *He also was aloft.*

The witnesses from the Tug Leonard Richards.

Capt. **McDavitt** could not say how far off the Holberg was when he first saw her (21). Tells about blowing two whistles and getting an answer of one whistle (21) and giving back one, and repeating it and getting no answer, and then starboarding to save his tug, when the Holberg was nearly on top of the tug, **so close he could have tossed a biscuit aboard of her** (22). "*There was a light fog*, getting thicker all the while. It looked thick and *fog banks ahead*, * * * as we came up towards the Narrows" (p. 23).

Mate **Devlin** (p. 20) saw the Holberg "about half a mile away" (22). Tells about the same whistles.

Outside Witnesses.

The steamship **Old Dominion** left her dock, Pier 26, at the foot of Beach street, North River, at 3.23 P. M., passed the Narrows at 4 P. M., and did not get any thick fog till she reached buoy No. **8** at 4.26 (**Card,** Mate, 16 to 18 inclusive; Capt. **Smith,** p. 16).

> **Note.**—The Old Dominion was at No. **8** at the precise moment when the collision occurred a quarter of a mile south of No. 11, and was, therefore, one and a half miles further south.

The steamship **Wyanoke** left the same pier (26 North River) at 3.27 P. M. (following the Old Dominion), and got no fog till about 4.20, when it *began* to get foggy, a light fog, and show indications of fog ahead, and Capt. **Hulphers SAW** the Old Dominion when she turned buoy No. **8** at 4.26 (13). The Wyanoke rounded No. **8** at 4.32 (and was therefore **6 minutes** behind the Old Dominion), and then ran into a dense fog (14). The Wyanoke passed the Quickstep between No. **11** and No. **8,** and much nearer to the place of collision than the Old Dominion. *She also passed the Holberg in the* **inside** *of the narrows* (13) and was "*a little past the Holberg when he passed Fort "Lafayette*" (p. 14) (*i. e.*, had passed the Holberg before reaching Fort Lafayette).

Mate **Leyland,** of the Wyanoke, produced her log (p. 15), and testified as to it being very light fog at 4.20 P. M., and to meeting the *dense* fog at 4.32 at No. **8** (15) and seeing the Quickstep to northward of No. **8** and reading her name with his naked eye.

Summary.

It is apparent from the above statement of the condition of the atmosphere that the dense fog which prevailed to those on the Holberg commenced after the Old Dominion and Wyanoke had passed the Narrows and that it extended up the Narrows and caught the St. John at Bay Ridge (39) which carried it with her to a little below No. **11** (39, 42) when it lightened up, and that the Quickstep and Aristos were not in this **dense** fog while going from No. **8** towards No. **11.**

The Holberg was in DENSE fog from the Narrows to just before the collision.

The **8th and 10th Exceptions** (p. 56) are to the refusal of the Circuit Court to amend the 7th Finding (p. 51) as requested (8th and 10th Amendments (p. 53), by inserting "dense" before "fog." The Finding was:

"This **fog** had prevailed between the Narrows and buoy "**No. 11.**" "There was **so much fog** as to prevent vessels "from being visible to each other for more than a short "distance."

The **claimants'** 5th proposed Finding (p. 49) reads: "The Holberg first saw in the **dense** fog, the loom or shadow of the bark in tow." "The fog still being **dense,** a whistle was heard," etc.

Of the Holberg witnesses the following speak of the fog as "*dense*":

Capt. **Busch,** of the Holberg, p. 35: "About 10 minutes after then it came *dense* fog, we couldn't see anything": p. 36: "The weather was then *dense* fog"; p. 37: "We were steering by it (the compass) in the *thick* fog."

Capt. **Warren,** of the St. John, p. 39: "We ran into a *thick* fog." "When we passed buoy No. 11 it was *dense* fog." P. 40: "I got to Craven Shoals * * * then it was *dense* fog." "We got in the *dense* part of the fog in the Narrows."

Mate **Busch,** of the Holberg, reads from **log of the Holberg,** p. 28: "At about 4.00 P.M. *dense* fog set in";

p. 29; "It was thick, foggy"; p. 29: "When the fog shut down *thick*, I think we were between the Quarantine Station and the fort on Staten Island."

2d Mate **Johnson**, of the Holberg, p. 24: "It was then *dense* fog." "I could not see either side of the Narrows then; I could not see anything at all."

Carpenter **Olsen**, of the Holberg, p. 30: "I did not see either of the forts"; p. 31. "When I went forward on lookout the Holberg was just below the first fort on Staten Island." "The fog did not come all at once. It came with the wind. *At the time it began the fort on Staten Island was a little abaft our beam;* from that time up to the collision the *fog was getting thicker and thicker.*"

Boatswain **Larsen**, of the Holberg, p. 31: "The fog just commenced when near Quarantine Station and *shut in* after they had passed the fort on Staten Island. He could not see the fort plain. *He was aloft.*

Wheelsman **Asmundsen**, of the Holberg, p. 33: "When "we arrived between Quarantine Station and Staten "Island we got *thick* fog—*dense* fog."

Wheelsman **Suckow**, of the Holberg, p. 35: "I was relieved of the wheel by Asmundsen and I went forward. The weather when I left the wheel was commencing to be thick. It was getting *thicker and thicker* as we advanced down the bay."

Seaman **Ericksen**, of the Holberg, p. 24: "It soon came *thick*."

Pilot **Mapes**, of the Holberg, p. 42: "We struck a *thick fog* in the Narrows, just below Lower Quarantine at Clifton, Staten Island." "It was *very thick*," p. 44. "After I passed the Narrows I don't remember seeing anything. I mean after passing Fort Lafayette." * * * "I couldn't see Fort Lafayette when passing it, nor Fort Wadsworth" * * * p. 46 (speaking of between buoys 11 and 13). "The fog before that was *very thick*."

Lighthouse Keeper **Davie**, at Fort Tompkins light, p. 48, reading from his journal: "Cloudy up to four o'clock, and then with *heavy fog* lasting from 4.00 P.M. until 6.00 P.M. * * * At four o'clock the fog was thick. *You could almost cut it with a knife.* Couldn't see twice the length of the court room."

Corporal **Wright,** of the Army, at Fort Wadsworth: "About 4.00 P.M. he went to the lighthouse; * * * about four o'clock it was a *thick fog—could not see over 50 yards*; * * * remained there till about twenty minutes of 5:00 P.M., and all the while there was a *thick fog.*"

The claimants in their **statement of defence** said (p. 24): "We allege **dense** fog which began at the time the S. Holberg was **approaching** the Narrows at about 4.00 P.M."

The claimants in their **answer** (p. 5) said: "*Before* reaching the Narrows the weather became foggy." * * * "As the fog became more **dense.**" * * * "The fog being still **dense.**" * * * "Owing to the **density** of the fog."

Query: Why did the Circuit Judge refuse to find that the fog **where the Holberg was,** was dense?

CREDIBILITY OF WITNESSES MAY BE A QUESTION OF LAW.

If a witness swore, and was uncontradicted, that he saw the sun rise in the west on a given day, and the Court believed him, it would be an *error of law.* If he swore that he was in Washington on the 4th of July, 1894, at 12 o'clock, noon, and was in Boston fifteen minutes after 12 P. M., it would be an error of law to believe him.

North Star, 44 F. R., 496, Judge H. B. Brown. "* * "Such *obvious improbabilities* on the face of their testimony, "that there is raised, in my mind, something more than a sus- "picion that their intention was to make the testimony, so far "as possible, fit the exigencies of their case, *a practice very* "*common in collision cases.*"

Brig Stuggle, 9 Cranch, 74, Livingston, J. "Were the "Court *bound to decide* according to the positive testimony, "*without regard to other circumstances,* or to the situation or "character of the witnesses, *it might* be difficult to say that "the plea of necessity has not been satisfactorily made out. "* * What then are the **circumstances** *which it is*

" *difficult to reconcile* with the concurrent testimony of the wit-
" nesses who have been examined. * * Considering, therefore,
" the suspicious source from which the testimony is derived,
" *and the unfavorable and unexplained* **circumstances**
" which have been stated, the Court is *unanimously* of opinion
" that the sentence of the Circuit Court must be affirmed."

The **City of Alexandria,** 31 F. R., 431. A. Brown, J.
" **Computations** based upon the time and distance run, show
" the steamer *must* have been going at the rate of at least 11 or
" 12 knots."

The **Martello,** 39 F. R., 508., Lacombe, J. " The **most**
" **persuasive argument** as to her rate of speed **is**
" **found in a comparison of the time which**
" **elapsed with the distance traversed.**"

The **N. Strong,** P. (1892) 110. " So severe a blow was
" dealt by one vessel to the other *as to be* **inconsistent** (the
" speed of the tug being what I have found) with moderate
" speed on the part of the tug."

The **Lepanto,** 50 F. R., 235 (C. C. of Ap.), Hughes, J. " In
" every case of collision between ships, in which the testimony
" of one vessel is as unanimous and positive as it is in this, *if*
" *it nevertheless be in fact false*, **there is some physical**
" **circumstance, condition of things, or occur-**
" **rence developed in the evidence, to refute and**
" **discredit the false testimony.**"

The **Wenona,** 19 Wall., 58. " **Inferences from cir-**
" **cumstantial facts may frequently amount to**
" **full proof of a given theory, and may even be**
" **strong enough to overcome the force and**
" **effect of direct testimony to the contrary.**"

The **S. S. Wilhelm,** Taft, C. J., 59 F. R., 172 (C. C. of Ap.).
" These facts, which do not seem to have been considered by
" the learned Judges below, are taken from the testimony of the
" master himself, and make it **mathematically demon-**
" **strable** that when he rounded to a second time, after run-
" ning 10 miles, he was in or near the breakers, and *that his*
" *evidence, and that of his mate*, that they were then in 7

"fathoms of water and never less, and were never less than "three miles from the shore, **are untrue.**"

The **City of Cleveland,** 56 F. R., 728, H. B. Brown, *J.*: "I say in this case, as I have said in two or three others, that *I* "*care very little for mere preponderance of evidence*, and that "in a conflict of testimony in a collision case, I determine the "case **from the conceded facts and probabilities** "rather than from any attempt to reconcile the conflicting "testimony of the crew."

Ward *vs.* **Chamberlain,** 21 How., 562, Clifford, *J.*: "Rejecting his testimony *as incredible*, **because incon-"sistent with the admitted and well established "facts** in the case, we are left without any testimony in the "record," etc.

The **Des Moines,** Appendix, 154, U. S., 584, Davis, *J.*: "As is usual in cases of this character, there is a conflict of tes-"timony between the officers and crew of the two boats on "important points, but the **physical facts** of the case "establish the proposition, that on the disputed point of most "significance, the Des Moines was blamable."

In **Hunter** *vs.* **N. Y., O. & W. R. R.,** 116 N. Y., 615, the Court of Appeals (2d Div.) reversed a judgment in an action for personal injury entered on the verdict of a jury; the proof being that the plaintiff was *seated* on top of car 11 ft. 2 in. high and while passing through an arched tunnel 15 ft. 9 in. high, the plaintiff claiming that, while seated, his head struck the arch.

The Court says (p. 619): "The difficult question in the case "is to reconcile the plaintiff's theory of the accident with the "evidence * *. (p. 620) "There was therefore a space of "4 ft. and 7 in. between the top of the car where the plaintiff "was sitting and the bottom of the arch. There was a cut or "gash on plaintiff's forehead, which it is claimed he received "by coming in contact with the arch, so that his head to have "received a blow at that point, must have been at least 4 ft. "8 in. above the foot-board on the top of the car * *."

The Court then referred to its right to take judicial notice of the ordinary height of a man seated, and said, p. 624: "*Here the*

"*finding, which must exist to support the judgment,* **is so** "**contrary to our general knowledge** *and so far* "*outside of common occurrence, that it may in the absence of* "*further proof be regarded as* **contrary to nature,** *and* "*hence untrue.*"

TIME AND DISTANCE.

Text.

The **Martello,** 39 F. R., 508, Lacombe, *J.:* "The most *per-* "*suasive* argument as to her rate of speed is found in a "comparison of the time which elapsed with the distance "traversed."

The **City of Alexandria**, 31 F. R., 431, A. Brown, *D. J.:* "*Computation, based upon the time and distance run,* shows "the steamer **must** have been going at the rate of at least 11 "or 12 knots."

The **Oceanic,** 61 F. R., 338; Morrow, D. J., 354. "But "was the Oceanic proceeding dead slow? * * * "To traverse this distance in 8 minutes requires a speed of "more than 10 knots an hour, and yet the pilot tells us, that in "going dead slow he was making 3 to 4 knots through the "water, without regard to the effect of the tide, and that the "tide was running two or three knots. The greatest possible "speed, he admits is therefore no more than 7 knots over the "ground. * * Had this vessel been going over the "ground at the rate of 7 knots per hour, her highest possible "speed at that time according to the pilot, she would have "required 12 minutes to pass from a point directly abeam of "Point Bonita to a point directly abeam of Point Diabalo, and "*more than 17 minutes to pass from Point Bonita to the place* "*where the order was given to go full speed astern.* It is plain "therefore that either the Oceanic was going at a higher rate "of speed than has been admitted by her officers, or the interval "of time between the orders to go dead slow and to reverse was "greater than that stated by the witnesses. * *

The Time of the Collision.

The collision was *found* to have occurred at about 4:26 P. M. (2d Fdg., p. 50).

Capt. **Busch** of the Holberg testified (p. 36): "The time of the collision was about 25 minutes past four. **I looked at my watch then,** as soon as we were free from the bark, **about one minute after** the collision."

Pilot **Wood** of the Quickstep said (p. 19): "The collision "happened about 4:25 or 4:26 P. M."

Cap. **Axelsen** of the Aristos (claimant's witness) said (47): "That at 4:30 P. M. he passed the same bark after the collision "on the left of the Aristos and that the bark was sinking."

Pilot **Johnson** of the Aristos (claimant's witness) said (47): "Coming up to buoy No. 8, it kind of scaled up, that he could see then a mile off, that he saw the bark's upper yards (but not her hull) quite plain, and a steamer in to the westward, which he took for a small Norwegian fruiter (*which the Holberg was*). That (p. 48) he passed close astern of the bark, 15 feet off, and could see her stern hanging off."

The estimates of time by other witnesses were made without the aid of clocks.

Devlin, mate of tug, says (p. 21): There was no clock in the pilot house.

McDevitt, master of tug, says (p. 23): "I do not remember looking at a clock."

Eide, ch. eng. of H., says (p.32): "The clock in the engine room does not go."

Berg, 2d. eng. of H., says (p. 32): "Neither the first or second "engineer looked at any watch or clock."

Knudson, fireman of H., says (p. 32): "He did not carry a "watch and the clock was not running."

Pilot **Mapes** of the H. (p. 46): I consulted no watch * * * I don't always have one.

Judge Brown found "that the collision took place at "about 4.25 P. M" (p. 60.)

No injustice will be done the claimant by giving them the benefit of the extra minute allowed by Judge Lacombe, and accepting his finding that it occurred about 4.26 P. M.

That the Holberg was at Quarantine, inside of the Narrows, at 4 P. M. and must have passed Fort Lafayette at about 4.05 P. M. has been shown in this brief at pp. 36 to 38. She, therefore, had 21 minutes in which to traverse the space from the forts to the place of collision which Judge Lacombe (*by making* the collision occur "*a little*" to the southward and eastward of buoy No. 11; 2d Fdg.) fixed at $3\frac{1}{8}$ knots (6th Fdg.) or 19,000 feet.

19,000 feet in 21 minutes is at the rate of $9\frac{1}{21}$ *knots an hour.*

But by his 9th Finding (p. 52) Judge Lacombe reduced the Holberg's speed to 4 knots *over the ground* and kept it so reduced while going 4,500 ft., or for $11\frac{1}{4}$ minutes.

Deducting the 4,500 ft. from the 19,000 leaves 14,500 ft. to be traversed, and deducting the $11\frac{1}{4}$ minutes from 4.26 leaves $4.14\frac{3}{4}$* and as Judge Lacombe found that it was *nearly* 4 o'clock when the Holberg reached Fort Lafayette (6th Fdg., p. 51) (*while in truth it was nearly 4.05.*), she had, according to him, $14\frac{3}{4}$ minutes to run 14,500 ft., or nearly ten knots an hour *all the time* (*i. e.* no half speed as he found). Besides this the St. John passed the Holberg a *little* below *No. 13* buoy, and from No. 13 to No. 11 is 4,500 ft.; and the collision is found to have occurred a *little* below No. 11 (2d Fdg., p. 50), and as the Holberg was a little below No. 13 at 4.15, **the St. John must have been there too** (if the Circuit Court's findings are right).

But the St. John was **at Craven's Shoal** at 4.16 P. M., and it is 7,220 feet north of buoy No. 13.

Therefore the Holberg was not at No. 13 to be there passed by the St. John at 4.15, and the Holberg was not at Craven Shoals at 4.16, for then she would have (7,220 + 4,500) 11,720 ft. to run to the place of collision and 10 minutes to do it in.

* I deduct from 4.26 *instead of 4.21* because Judge Lacombe (*wrongfully*) found that it was nearly 4 P. M. when the Holberg reached the Narrows, and I am proving that *his* mathematics are absurd.

THE EXCEPTIONS.

The Holberg was inside the Narrows, in a dense fog, at 4.05 P. M.

The **12th Exception** (p. 56) is to the refusal to amend the 8th Finding (p. 51) as requested (12th Amendment, p. 53) by stating "that the Ludvig Holberg ran into this fog *before* she passed the forts."

The **7th Exception** (p. 56) is to so much of the 6th Finding (p. 51) as finds "*that it was nearly 4 P. M. when the Holberg* "*reached Fort Lafayette*," and the **32d Exception** (p. 58) is to the refusal to find that "*the steamship Holberg reached* "*Fort Lafayette about 4.05.*"

The Statement of Defence (p. 24) was: "We allege dense fog, "which *began* at the time the Ludvig Holberg was *approaching* "the Narrows, at about 4 o'clock P. M. of the day of the "collision."

The 8th Article of the answer (p. 5) alleges: "As said steamship "proceeded down the bay and reached a point in the channel, "**between** Quarantine Station, at Clifton, and Fort Wads-"worth, on Staten Island, *and* **before** *reaching the Narrows*, "the weather became foggy."

The **Log** of the Holberg (p. 28) reads at p. 102: "At 4 P. M. dense fog set in," and at p. 316: "At 3.30 P. M. dense fog set in."

Mate **Bush** testified (p. 29): "The second mate * * was "going down to get a cup of coffee. * * When he went "below my vessel was about 'abreast of Quarantine Station "* * at the southern end of it, I guess, *about 4*, perhaps **a** "**little after 4**, when the second mate went below to get a "cup of coffee.

"When the fog shut down *thick* I think we were between "the Quarantine Station and the fort on Staten Island."

Second Mate **Johnson** (p. 25): "The Holberg at the time "I went down to supper was abreast of (p. 26) Staten Island; "*she was about a mile from the fort;* when I went below "for supper **it was 4 o'clock**. Q. You are positive of

"that? A. Yes, **4 o'clock**; it was about 4 o'clock; not after "4 o'clock. Q. How long did you stay below getting supper? "A. About five minutes I think. I did not get any supper. I "was going to have it when they blew the whistle and I went "on deck. *When I came on deck* the vessel, in *my opinion*, "*was just about abreast of the fort*, in the Narrows, but I "couldn't see anything.* I looked, of course, when I came on "deck, but I could see nothing at all."

Capt. **Busch** (p. 35): "After we left Quarantine Station we "couldn't see anything. *I did not see either of those forts as "I passed, as I went out.*"

Pilot **Mapes** (p. 42): "We struck a thick fog in the Narrows, "just below lower Quarantine Station, at Clifton, Staten Island." (P. 44.) "Q. Where was the Holberg when the first signals "were given on account of any fog? A. She was in the Nar- "rows, on the Staten Island side, **north** of Fort Lafayette. I "cannot say how much to the *north* of a line drawn from Fort "Lafayette to Fort Wadsworth. I don't think over half a "mile; about half a mile, I think."

(P. 46.) "Eight bells on ship is 12 o'clock and 4 o'clock. On "sea-going vessels *watches are changed at 12 o'clock and at 4 "o'clock.*"

"Nautical Catechism."

"Q. What do you do at four o'clock?
"A. Strike eight bells—
"Call the watch,
"Hold the reel,
"Pump ship, and
"**Change the wheel.**"

Wheelsman **Asmundsen** (p. 33): "Q. Where was it you re- "lieved the other man at the wheel? A. It was **before** we "arrived at the Quarantine Station." * * "The weather at "the time I first took the wheel was clear. It was clear up to "the time we got between Quarantine Station and Staten Island. "When we arrived between Quarantine Station and Staten "Island we got thick fog—*dense* fog."

Suckow was relieved at the wheel by Asmundsen (p. 35). "When I left the wheel it *was commencing to be thick.*"

* NOTE.—Johnson could not see the forts—but he could hear the fog bell on Ft. Lafayette which Pilot Mapes heard as the Holberg passed the fort (see foot of p. 44).

The **Old Dominion** left Pier 26 N. R., at 3:23 P. M. (Cates, Mate, 16, Log of O. D., p. 18).

Capt. Smith, of O. D., saw the Holberg in the East River just the other side of South Ferry (*i. e.*, between Governor's Island and Pier 1 or 2 E. R.). The O. D. passed the Narrows at 4 P. M. (Log, p. 18; Cates, p. 16) and of course was *ahead* of the Holberg.

The **Wyanoke** left Pier 26 N. R. at 3:27 (Leyland, p. 15) followed the O. D. down, **behind her, four to five minutes.** Capt. Hulpher first saw the Holberg *off Castle William* on Governor's Island, when he was *off* his pier, 26 N. R. (p. 14). When he got down to Bay Ridge (buoy 18) he was near enough to make out her name *on her stern*, and passed her above the Narrows. He says, p. 14: "I was pretty near abreast of Fort "Lafayette when I passed the Holberg. May have been a little "past the Holberg when I was abreast of the fort."

It is thus demonstrated that the Holberg ran into the fog **before** she passed the Narrows and that it was **after** four o'clock and about 4:05 when she reached Fort Lafayette.

The **9th Exception** (56) is to the refusal to amend the 7th Finding (51) as requested (9th Amdt., 53) so as to specify 200 ft. in place of "*a short distance*" as the limit of vision in the fog.

The **19th Exception** (57) is to the refusal to amend the 11th Finding (52) as requested (15th Amdt., p. 53) by specifying how many hundred feet off the tugboat was when she first came in sight, in place of the indefinite expression "a *few* hundred."

These two exceptions may be grouped. Although the Circuit Court so wrongfully refused to find that the fog where the Holberg was, was "*dense*" (8th Amdt., p. 53; 8th Excep., p. 56; 10th Amdt., p. 53; 10 Ex., p. 56) it did find (7 Fdg.), that "*there* "*was so much fog as to prevent vessels from being visible to* "*each other for more than a* **short** *distance* (estimated by the "witnesses from the Holberg at between 200 and 300 ft." (p. 51).

The *estimate* of these witnesses is the same as the pleading of the claimants (see answer, p. 5) and to this admission is added the 5th request to find of claimants, to the same effect (p. 49).

No injustice will be done claimants by accepting this "**estimate**" *as a fact.*

THE HOLBERG STARBOARDED ONLY ONE POINT.

Resemblance of this case to the "Martello."

BROWN, *J.*, p. 153 U. S., 70: "These findings indicate that the "Martello took no action to avoid the collision until she saw "the Willey looming up in the fog—which was a minute or two "after hearing the horn. Under the circumstances, we think "the steamer did not act with sufficient promptness."

The **Stephen Morgan**, 94 U. S., 603. CLIFFORD, *J.*: "All that the steamer did in the outset was to change her "course a point. * * Porting the helm a point when the "light of a sailing vessel is just observed, and then waiting "until a collision is imminent before doing anything further "does not satisfy the requirements of the law."

Judge Lacombe finds (11th Fdg.).: "Almost immediately after "the tug came in sight only a few hundred feet off * * and "gave a signal of two blasts (13th Fdg.). Upon receiving the "signal of two whistles from the tug *the steamer starboarded* "*and passed the tug starboard to starboard, clearing her about* "*30 feet.*"

From the above, the reader might suppose that it was the starboarding of the Holberg which enabled her to clear the tug; but the Circuit Judge wrongfully refused to grant the 16th Amendment (p. 54; see **21st Exception,** p. 57), which would have limited the starboarding to **about one point,** and also refused the 17th Amendment (p. 54, see **22d Exception,** p. 57), which would have shown that her clearing the tug was "by "reason of the tug at the same time taking a *rank sheer to port*" (see also 26th Exception, 57, to 19th Fdg., 52).

These **facts** were proved by uncontradicted evidence.

(1) The **one-point** starboarding of the Holberg was proved by her own witnesses. Pilot **Mapes** (p. 43) said the course he was steering in the fog was S. ½ W. (p. 43) and that "the tug, "after she came in sight, blew two whistles; we blew two whis- "tles too, and I gave an order to the man at the wheel to *star-* "*board* and he did it. Q. How much did it swing the vessel? "A. It did not *but* a little, *before* I saw the bark."

Capt. **Busch** (37) said the Holberg's course at the time he saw the tug was S. ½ W. and after the helm had been starboarded and *steadied again*, the Holberg headed about S. ½ E. (p. 38), *i. e., a change of one point.*

Asmundsen, the wheelsman (34), said: "I had given her "the starboard helm, *and after she had swung a point*, under "the starboard helm, then I got the order to put it hard a-port "and I did so, and the Captain assisted me."

(**2.**) **The rank sheer of the tug** was proved by the claimants' witness, as well as libellant's.

Mapes, pilot of the Holberg (p. 43), said he *first* saw the tug half a point on his starboard bow, bearing "a little S. by W.; about S." The Holberg was steering about S. one-half W., that the tug, after she came in sight, blew two whistles, and the Holberg blew two and starboarded her helm, which swung the Holberg "but a little" (*i.e.*, to port or to the east, and should have caused the tug to broaden on the starboard bow very rapidly as she came up); but Mapes says (p. 45): "When the "tug was within a hundred feet of me, the most she ever bore "from our starboard bow was about S. S. W." * * "that "would be two points on the starboard bow" (*i.e.*, when the Holberg headed S.).

And on the same page (p. 45) **Mapes** *made the following very significant statement, corroborative of the evidence of those on the tug and bark*, but ignored or not understood by Judges Brown and Lacombe:

"When the tugboat came up, I could see the whole length of "her; when she *starboarded* (*i.e.*, went to port, or to the west-"ward) **and crossed our bow.** I mean to say that the "tugboat actually crossed our bow—*the whole of her crossed "our bow* * * when that hawser was struck the tug was on "the starboard bow, S. S. W. from us, I should judge—*bearing "off the line of the steamer*, **heading about W. N. W. "She was heading four or five points off the "line of the steamer."**

Capt. Busch, of the Holberg (p. 37), said: "When I first saw "the tug we were going S. one-half W., and he was going about "north, I should say, parallel;" and at p. 36 he says: "When "I first saw the *bark*, the tugboat was bearing about five or six

"points on my starboard bow. **The tugboat's course "was,** I should say, **about northwest.**"

If the above does not show a *rank sheer* of the tug, it is difficult to imagine one. She was heading on the channel course of *about* north when seen, and, to escape a collision with the Holberg, *crosses her bows* and heads W. N. W. (*i.e.*, a change of course of six points in less than 200 feet), as Mapes says, or N. W. (*i.e.*, a change of four points), as Capt. Busch says.

Capt. McDevitt, of the tug, p. 21, tells how he sighted the Holberg **showing her whole** (p. 23) **starboard side** (21) to him, and therefore crossing his course to the eastward, and concluded that to go to the westward himself was proper (23) and therefore blew two whistles and (p. 21) got an answer of one whistle. The Holberg was pretty nearly ahead, heading about S., and the tug heading about N. by E. one-half E. The Holberg then ported her wheel (*i. e.*, went to the westward), but not enough to clear the tug, but kept coming head on. The tug had answered with one whistle and ported (*i. e.*, gone to the eastward, which would bring her on the port side of the Holberg and in the position she must have been in to afterwards cross the bows of the Holberg and get the bearing of S. S. W. from the Holberg, testified to by Mapes), and (p. 22) observing that the Holberg did not seem to port (*i e.*, go to the westward) fast enough to clear her, the tug again blew a single whistle and got no answer. *Then the tug slowed* (p. 22). The Holberg was getting very near then and heading *right at the tug*, which was in the center of the channel. *Then the Holberg starboarded when pretty near on top of the tug*, and the tug, *to save the vessel*, had to starboard. Her wheel had been a-port till then. "*When I sheered to starboard I could toss a biscuit aboard of* "*of her. She just cleared us and no more.*"

Mate Devlin (p. 21) says the same, and that the Holberg missed the tug by about 25 feet.

Judge Lacombe finds 30 feet (13th Fdg., p. 52).

See diagram.

Judge Bradley clearly summarizes this evidence in the **Leonard Richards** (43 F. R., p. 543, see Appendix to these Points, p. 88). He says: "The tug with the Quickstep in "tow * * were heading north by east on the course of that "channel when they discovered the Holberg coming down the

"channel, about half a mile distant, nearly ahead but *slightly* "*on their port bow*, she, the Holberg, heading a little more "southeasterly than the reverse course of the tug and bark *so* "*as to show her starboard bow and side.*

"Thereupon the tug, *as was proper to do*, blew two blasts "of the whistle to signify that she proposed to pass to the left, "that is on the starboard side of the Holberg. But the latter "did not accept this offer and replied with a single blast "signifying to *port* helm and pass each other to the right, "or each on the port side of the other. The tug at once "accepted this signal and replied by a single blast to that "effect, and immediately *ported* her helm accordingly and the "Quickstep did the same, *but the Holberg after porting her* "*helm sufficiently to bring her head on to the tug and bark*, "**steadied her helm so as to run directly to-**"**wards them**. Seeing this the captain of the tug repeated "the single blast to call the attention of the Holberg to the "manœuvre agreed on. But, then the Holberg, when so near "as to render a collision almost inevitable, blew two blasts, and "the tug, to escape being run down, **turned quickly to** "**the left and just escaped**, by a distance of only ten "or a dozen feet. The bark was absolutely unable to get out "of the way.

The **23d Exception** (p. 57) is to the refusal to amend the 14th Finding (52) as requested (18th Amdt., p. 54) by making it appear that the Quickstep was steered to starboard in obedience to the tug and Holberg's single whistle.

Pilot **Wood**, of the Quickstep, testified (p. 19): "The tug "blew first and then ported and I ported, and then got an "*answer* of one whistle."

Note.—Wood had already (p. 19) told of seeing the *starboard side* of the Holberg ahead, which was complete proof that she was directed *across* the channel, from W. to E.; and McDevitt, pilot of the tug, says (p. 23) the same. This located the tug on the starboard side of the Holberg, and on that side they heard the tug's second whistle (Capt. Busch 35). Wood also told (19) about the tug giving two whistles to the Holberg while she was thus showing her starboard side—a signal which told her the tug would go to the west and astern of the Holberg). McDevitt said (p. 23): "I thought two whistles would be "handier for both of us;" and Judge Bradley says he did right (Appendix, p. 89)

Wood obeyed the two whistles and also starboarded (so say Ludden (12), and Larsen (12) who got the order and worked the wheel of the Quickstep).

McDevitt says (p. 23) the Holberg answered the tug's two whistles with one—Wood says (19) the tug blew the single whistle before the Holberg, and the Holberg answered with one (a mistake in locating the source of the whistle he heard; for, of course, McDevitt and Delvin (21), his mate on the tug, would know best).

The Holberg Passed Bedloe's Island After 3.35 P. M.

The **5th Exception** (56) is to the refusal to **amend** the 6th finding (51) by striking out "between 3.27 and" and specifying more exactly the time the Holberg was off Bedloe's Island. The 6th Finding puts the H. off Bedloe's Island between 3.27 and 3.32. She left Pier 15, E. R., at 3.05 to 3.15 (5th Fdg.). Pilot **Mapes** says (p. 44) he supposed it took her 30 minutes from her dock to Bedloe's Island, which would make it *at least* 3.35 P. M. when she passed that island. **But** the Holberg was seen by the Old Dominion off South Ferry (p. 16), and the Old Dominion left Pier 26, N. R., at 3.23, and passed Governor's Island at 3.33 (Log of O. D., p. 18), and was *ahead* of the Holberg all the time.

The Holberg *could* not run from South Ferry, where she was seen by Capt. Smith at 3.28, to abreast of Bedloe's Island (the distance being over a mile) in any less than 7 minutes.

Capt. Hulphers says (p. 14) when the Wyanoke got down by the Bay Ridge buoy he was near enough to make out the Holberg's name on her stern. The O. D. passed Bay Ridge buoy (No. 18) at 3.51 P. M. (p. 18), and the Wyanoke was 4 minutes behind the O. D., and therefore passed it at 3.55 P. M.

As the Wyanoke saw the Holberg's name on her stern, and later passed the Holberg **inside** the Narrows (p. 14), the Holberg must have passed No. 18 two minutes before the Wyanoke, and as the H.'s full speed was 9 to 9½ knots, which is 900 to 950 feet in a minute, the H. would be about 1,900 feet nearer the Narrows than the Wyanoke was. From the Bay Ridge buoy No. 18, to Fort Lafayette is 1⅞ nautical miles, which is 11,500 feet [see chart—Capt. Hulphers thinks 2 miles (p. 14); Capt. Warren says it is a little less (p. 41).] The Holberg would,

therefore, have had (11,500–1,900), 9,600 feet to go in 10 minutes (*i. e.* from 3.55 when the Wyanoke was at buoy No. 18 and saw the H.'s name on her stern, to 4.05 when the H. passed Fort Lafayette), or at the rate of $9\frac{6}{10}$ knots an hour, and she had the *last of the ebb* helping her.

I say the Holberg was two minutes or 1,900 feet ahead of the Wyanoke at buoy No. 18, for 10 minutes later the W. passed her—and as the W. made 1,125 feet in one minute (*i. e.* $11\frac{1}{4}$ knots an hour, Hulphers, p. 14), and the H. made 900 to 950 (*i. e.* 9 to $9\frac{1}{2}$ knots, 5th Edg., p. 51), the difference was 200 feet a minute—and in 10 minutes the W. would make up the 1,900 feet, the H. was ahead.

If the H. passed buoy No. **18** at 3.53, as she changed her wheelsman before reaching Quarantine, and, therefore, at or after 4 P. M., and as buoy No. 18 is $1\frac{3}{8}$ miles, which is 8,360 feet from Quarantine, and the H.'s speed was, say, 935 feet in a minute, she could not have gone more than (935 x 7)=6,545, and therefore, was nearly $\frac{1}{8}$ of a mile north of Quarantine at 4 P. M., which is in substance what Asmundsen testified (p. 33).

Therefore, I say, as the Holberg was at Bay Ridge buoy (No. 18) at 3.53 P. M., and from Bedloe's Island to buoy No. 18 is 17,290 ft., and as the Holberg ran full speed ($8\frac{1}{2}$ to 9 knots; Mapes, p. 42) from Bedloe's Island (Mapes, p. 44), she ran it (with the assistance of the last of the ebb tide) in 17 minutes, which would put her abreast of Bedloe's Island at 3.36.

The **24th Exception** (57) is to the 16th Finding (52) as immaterial. This finding is: "If the hawser had been cast off "promptly the steamer would *probably* have gone safely between "the tug and the bark."

The 15th Finding states that the Holberg hailed the tug to cast off the hawser. There is no finding that the bark was requested to cast it off.

As far as the cargo is concerned it is immaterial, but it is also an instance of *hind sight*, which the *experienced* judges so often reprobate.

Thus, Judge Bradley says (Appendix, p. 90): "The after "wisdom which points out what might have been done, but "which the ordinary rules of human conduct do not expect to "be done, is no criterion for judging of culpability."

Capt. McDevitt, of the tug, says (p. 22): "We tried to cast

"the hawser off before she struck it; the deckhand, the fireman "and the cook tried to do that. Before they got it cast off the "bitts she had cut it in two. *We didn't expect her to pass between "the bark and the steamer. If we had expected that we would "have had men standing there with an axe to let it go.*"

Ludden, wheelman of the Q., says (p. 12): "The pilot (Wood) "gave the word, 'let go the tow rope' * * * but the steamer "parted it as soon as the order was given."

The **11th Exception** (56) is to the refusal to **amend** the 7th Finding (51) as requested (11th Amdt., 53) by making the time the fog prevailed between the Narrows and buoy **No. 11,** at least 20 minutes before the collision, instead of 15 minutes.

As it is shown in the discussion (on p. 28 of this Brief) of the 8th and 10th Exceptions the Holberg was in *dense* fog from its commencement until the collision; and by the discussion under the 12th and 7th Exceptions (page 36 of Brief), the Holberg was inside the Narrows at 4.05 P. M., and as the collision occurred in dense fog (7th Finding, p. 51) and occurred at 4.26 P. M., it follows that "this fog prevailed at least 20 minutes"—instead of 15 minutes.

The **25th Exception** (57) is to that part of the 18th Finding (p. 52) which states that "*the Holberg was nearly stopped "at the time of the collision.*"

Physics teach us that weight and *momentum* are the constituents of force. Here was the light (unloaded) s.s. Holberg, striking the heavily loaded Quickstep, and cutting into her and *her solid cargo of sugar in baskets* (in consistency like an earthwork or solid bank) and "cutting in to her after companion-"door, **a distance of nine feet,** *cutting her open* so that "the cargo rolled out" (2d Finding, p. 50), suffering no injury herself (Mate Bush, p. 29), and yet she (the Holberg) was *nearly stopped.*

Credulity could no further go.

The **N. Strong.** P. (1892) 119. "So severe a blow was "dealt by one vessel to the other as to be inconsistent (the speed "of the tug being what I have found) with moderate speed on "the part of the tug."

The North Star, 43 F. R., 815. Judge Henry B. Brown (815). "*The consequence was that she ran into the Sheffield*

"*four or five feet. What speed does that indicate?* * * *
"The experienced seamen, who sit with me in this case, give it
"as their opinion that she must have been going, *considering*
"*the depth of the cut* and all the facts, at a speed of about five
"miles an hour, and I concur in that opinion. In further cor-
"roboration of this we have the testimony of a large number of
"witnesses upon the Sheffield who were looking for the Star, as
"she hove in sight, and say that she came at them with '*a large*
"*bone in her teeth.*' Upon the other hand, the witnesses upon
"the Star seemed to have taken the precaution to look over her
"stem and say there was no bone there. We deem it extremely
"improbable, however, that the witnesses upon the Star should
"have been looking at her cut-water. They had undoubtedly
"taken the alarm, and were on the lookout for the appearance
"of the Sheffield."

The Oceanic, 61 F. R., 338; Morrow, J. "*That she was*
"*going at a higher rate of speed than dead slow is established*
"*by the fact that although she reversed a few minutes before*
"*the collision she drove her bow into the City of Chester some*
"*ten feet or about one-half the latter's beam.*"

McCarthy, 2d mate of Q., says (p. 10): "She keeled us
"right over when she struck us, she was going so fast."

Donovan, seaman on Q., says (10): "If the vessel had
"stopped she never could have hit us so hard as she did."

Ludden, seaman on Q., says (p. 12): "The steamer, when
"she struck the hawser had headway. *I could tell by the ripple*
"under her bow that she had headway. 'If she had been
"going astern (*i. e.* engines reversed) I could have seen her back-
"water and I did not notice any."

Larsen, seaman on Q. (p. 12): "The steamer was going
"ahead then (*i. e.* when she struck the hawser) and also at the
"time of the collision; *I could tell by the bow and the water.*"

Morrison, capt. of Q. (p. 13): "I noticed she had headway
"*by the ripple under her bow* at the time she struck the bark."

Bartell, seaman on Q. (p. 9): "I seen the water **rising**
"on her bow."

Wood, pilot of the Q. (p. 20): "Before the collision hap-"pened she did not stop her headway at all. She fetched up "into the bark * * * *The water was flying under her bow* and "she was going pretty fast; more than half speed."

McDevitt, captain of tug (p. 22): "The Holberg was mov-"ing through the water as she went by me at a pretty good gait. "I should judge, about six or seven miles an hour."

ONE WHEELSMAN IN A FOG IS NOT ENOUGH.

The **36th Exception** (58) is to the refusal to find that the Holberg was not properly navigated, in not having competent men at the wheel. (Libt's 9th proposed Finding, p. 50).

And the **2d Exception** (55) is to so much of the 4th Finding (p. 51) as finds that the Holberg was "*properly manned*," in connection with the same finding that she steered by hand, had one *ordinary* seaman at the wheel, and a dense fog prevailed.

Asmundsen was at the wheel of the Holberg; he was not 20 years old (p. 34), and was an *ordinary* seaman (not an A. B.), and had only followed the sea two years (p. 34), and he testified (p. 33): "After the bark was *seen* the pilot ordered the "helm hard a-port, **and the Captain came up and "helped me."**

Captain **Busch** said (p. 38): "I helped to put the helm "hard a-port."

Mate Busch says the same (p. 28).

It is obvious that if help was needed (and the Captain helping is a confession that it was), it should, *in that dense fog*, have been at the wheel, in the person of a second man stationed there.

The want of two men at the wheel in a fog is a fault.

In the "**Colorado**," 91 U. S., 698 the Court says:

"Enough appears to show conclusively that there was but "one lookout, and *no other seaman to assist the wheelsman in "any emergency which might arise*, though the master, as well "as the mate, was fully apprised that the fog was unusually "dense, and *both knew full well that the course of the propeller*

"*was in the much frequented pathway of commerce.* Such a "watch, consisting only of the mate, one wheelsman, and one "lookout besides the engineer, could hardly be deemed suffi- "cient for so large a propeller (1,470 tons, p. 697), even in a "clear night; and if not, it certainly cannot be regarded as one "equal to the emergencies likely to arise in a dark night, when "the fog was as dense as it was on the night of the col- "lision. * * *

"Sudden dangers of collision might reasonably have been "expected from the extreme darkness of the night *and the* "*known vicinity of other vessels.* Under such circumstances "it is apparent that the watch on deck, considering the size of "the propeller and her speed, was not sufficient for the occa- "sion. Support to that view, if more is needed, is found in the "fact that **when the emergency came the mate** "**deemed it necessary**, when he gave the second order to "the wheelsman, to direct the lookout **to leave the place** "**where he was stationed and go to the wheel** "**to help the wheelsman to put the same hard** "**a-starboard,** leaving the propeller for the time being "without any lookout. * * *

"Steamers of such size, under such circumstances, ought "never in a dark night to be without *a watch on deck suffi-* "*ciently effective to change the course of the vessel with celerity* "without withdrawing the lookout from his station and appro- "priate duties."

It is thus established that the Holberg was above Quarantine, inside of the Narrows, at 4 P. M., and passed Fort Lafayette about 4.04½ P. M.

As a necessary consequence the Holberg had 21 minutes to run the distance from the forts to the collision.

The false story of the Holberg's witnesses as to her speed.

The LOG of the Holberg (p. 28).

The Log at p. 102 :	The Log at p. 316 :
"At 4 P. M. dense fog set in."	"About 3.30 P. M. dense fog set in."
"Dense fog set in *for which* reason "the speed was reduced to half speed "and **soon** afterwards to slow."	"Dense fog set in, whereupon the "steamer **instantly** was given half "speed, and about *fifteen minutes later* "slow speed."
"Steamer's whistle kept going all "the time."	"The steamer's whistle was kept "going according to the rule."

Eide, ch. eng., says (32) he received an order half speed and then slow. Had no watch and can't tell how long they were going slow, but thinks about 15 minutes.

Berg, 2d eng., says (32) that engine was going half speed 10 or 12 minutes, and after that slow for about 15 or 16 minutes.

Knudson, fireman, says (32) the engine was going slow 10 to 15 minutes before the collision.

Asmundsen, wheelsman, says (33) the captain helped him put the wheel hard a-port after the bark was seen. "*Shortly* before that he had telegraphed to the engine to slow ; "long before that."

Query.—Did he accidentally tell the truth ?

Busch, 1st mate, says (30), after hesitating, that the Holberg was between Quarantine Station and the fort when she slowed.

Johnson, 2d mate, was asked (p. 26) if he could form an opinion as to how fast the H. was going when he saw the tug, and answered, 2 to 3 knots and that he knew she was going slow before the tug was seen.

Capt. **Busch** (p. 35) : "It was about abreast of that (Quar- "antine). The weather then commenced foggy. The weather "when it first began was not so thick. We could see 3 or 4 "ship's lengths (*i. e.* 600 to 800 ft.) when it commenced. *Then* "*I gave them half speed by telegraph.*"

(P. 37). "The pilot gave all the orders. *He gave the order* "*to half speed down off Quarantine Station*, **right abreast** "**of Quarantine Station.**"

Pilot **Mapes** (p. 42) testified: "Q. **Abreast** of what "point were you, about, when you slowed her to half speed?" "A. Craven's Shoals."

Note.—This shoal is 1⅛ miles *below* (*i. e.* south) of Ft. Lafayette and 1⅝ miles south of Quarantine Station (see chart) and this testimony of Mapes was therefore, that *he had kept full speed in a dense fog for* 1⅝ *miles.*

On cross-examination (p. 44) **Mapes** testified: "Q. Where "was the Holberg when the first signals were given on account "of any fog? A. She was in the Narrows, on the Staten Island "side, **north** of a line drawn from Ft. Lafayette to Ft. Wads-"worth; I don't think over half a mile; about half a mile, I think."

Note.—Quarantine Station is half a mile north of Ft. Lafayette.

"The *first order* that was given with reference to the fog on "that steamer was *half speed.*" * * * "*We commenced to* "*blow fog signals in the Narrows*, and **after** that order to go "half speed."

"Q. How far NORTH of that line drawn from "Ft. Lafayette to Ft. Wadsworth was the half "speed order given?"
"A. NOT OVER A QUARTER OF A MILE."

Note.—The Captain and the Pilot of the Holberg, therefore, both agreed that the order to go *half speed* was given *inside the Narrows;* the Captain saying ½ mile (*i. e.* off Quarantine) and Mapes, the pilot, saying ¼ mile.

"When the Holberg was running under this half speed bell "*from a quarter of a mile north* of a line drawn from those two "forts, her speed was about 6 knots through the water." (p. 44.)

Nota Bene.—As the Holberg was at Quarantine, inside the forts at 4 P. M. when the fog commenced and then and there (*as her lying witnesses say*) was put at half speed of (6 knots says Mapes, the pilot) 6½ to 7 knots (5th Finding)

SHE WOULD TAKE, IF SHE RAN THE ENTIRE DISTANCE OF 3¼ KNOTS FROM THE FORTS TO THE COLLISION (6th Finding) at 7 knots (*i. e.* 1 knot in 514 seconds) **26⅜ MINUTES,** not allowing any time for the ½ or ¼ mile she was *inside of the forts,* where she was put (as the lying witnesses say) at half speed. At six knots speed (*i. e.* 1 knot in 600 seconds) she would take 31¼ minutes and could not reach the place of collision before 4:31¼ P. M. If she ran any part of the distance at slow, or dead slow she would increase the time one minute for every 350 feet she ran slow.

TO ILLUSTRATE.—The Circuit Court found (9th Finding, p. 52) that the Holberg slowed down, when 4,500 feet away from the place of collision, to 4 knots over the ground (*i. e.* he added ½ knot for tide to her 3½ knots of slow speed) and as it was *over* 3¼ knots from the forts to the place of collision (6th Finding, p. 51) which is *over* 19,000 feet (*i. e.* 6080x3¼) therefore the Holberg ran *over* 14,500 feet at half speed (say at 7 knots or 700 feet in one minute) which would take her 20⅝ minutes and 4,500 feet at **4** knots (400 feet in one minute) which would take her 11¼ minutes—a total of 31⅞ minutes—and she would be in collision at 4:32 P. M. (*instead of 4:26 P. M.*), and two minutes *after* the Aristos went by her and saw the stern of the Quickstep hanging off. If she went the 14,500 feet at 7½ knots (an allowance of half a knot for tide) (the 6th Finding, p. 51, says the flood tide helped a vessel going out half a knot an hour, *i. e.* 50 feet a minute, *but it was slack water a little below the forts* and it was only after it ran flood that the 50 feet a minute should be added) it would take her 19⅓ minutes which, added to the 11¼ minutes, would make her in collision at 4:30½ P. M. (*i. e.* ½ minute after the Aristos passed the Quickstep. But if the time of collision is delayed for the Holberg, it must be for the Quickstep whose onward progress would continue and in the added 6 minutes she would advance (at 7 knots an hour, or 700 feet a minute) 4,200 feet and be near buoy **13** instead of south of buoy **11.**

Judge Lacombe, in his opinion (p. 66), says: "In this case "the disinterested witness, *who concededly was nearest to* "*the collision, both in time and place,* testified that he over- "took and passed the Holberg *going slow in a dense fog,* with "her fog signals sounding."

The above refers to Capt. Warren, of the St. Johns (38), who passed the Holberg, which he speaks of as a tramp steamer, (47) just below No. 13. Warren testified (p. 40): "I got to "Craven Shoal not later than 4.16."

(p. 39) "When we were just below Craven Shoal, or about "Craven Shoals buoy, I heard a steamboat whistle *directly* "*ahead* of us, and we slowed our boat right down as quick as "we could shut her off. We were running close shut down—we "did not stop—we were running not to exceed five miles an "hour, and we *passed* a steamboat, a tramp steamship. I "should judge it was about abreast of buoy 13, or probably a "a little below that. She was going on the same way we were, "heading on the same course out of New York. We passed "her on the starboard side (*i. e.*, to the westward of her; p. "41), just nicely clear of her. I did not take notice of her "name. **I couldn't have read it if I had tried to. "I could just see it was a steamship** * * (p. 40). "We did not come nearer to her than 100 yards. I first saw "the afterpart, not over 100 yards off, nearly right abreast. I "slowed down immediately to about 4 knots an hour, in one "minute, so that when I got abreast of her my speed through "the water was 4 or 5 miles. When I hooked on for full speed "I was right abreast of her. I was slowed down not to exceed "a minute. After I had hooked up again to get going full "speed did not exceed half a minute.

(p. 39) "We were running not to exceed five miles an hour. "* * We were running faster than she was. I should judge "they were running as close as they could down slow."

The above is the evidence of the "disinterested witness."

He was never nearer (by guess) than 300 feet, and could "*just see it was a steamship*," which he overtook and passed, which *at that moment* was "running as close as they could "down slow," and from that the learned Judge found (9th Fdg., p. 52): "By the time she had reached a point a little below "buoy No. 13 (*i. e.* where the St. Johns passed her) she had "slowed down to about four knots over the ground," and the learned Judge **inferred** *that she continued slowed down from* that point to the place of collision, a distance of 4,500 feet.*

* The Judge might as well *infer* that the St. Johns *kept* the speed of five miles she had in passing.

If she did, it took her $11\frac{1}{4}$ minutes, and as the collision occurred at 4.26 P. M. she must have been "*a little below buoy No. 13*" (where the St. Johns passed her) at $4.14\frac{3}{4}$; but if so the St. Johns must have been there too, and Warren's testimony about his speed and time show that this was *impossible*.

The speed of the St. Johns was 17 to 18 miles (39). She left pier 8 North River at 3.46 P. M. (38 and 39). Her ordinary running time to the Narrows is 25 to 28 minutes (39).

The distance from pier 8 to Bay Ridge buoy is $4\frac{3}{8}$ knots scant =26,600 feet scant (41), and from Bay Ridge to the fort two miles scant (41), and from the fort to Craven Shoal $1\frac{5}{16}$ miles (41).

Warren ran over the course six times a day, and said he could tell within twenty seconds where the St. J. was all the time (39).

He allowed for running from pier 8 to Bay Ridge buoy 16 min.
" Bay R. to Fort Lafayette 9 min.
" Ft. L. to Craven Shoal 5 min.

and said (41) it took $1\frac{1}{2}$ minutes to get under way after casting off.

This would take him to Craven Shoal in thirty minutes, or at 4.16 P. M., as he says (40), and make her speed as follows:

$4\frac{3}{8}$ knots=26,600 feet scant.
2 knots=12,160 feet scant.
$1\frac{1}{8}$ knots= 7,980 feet.

Scant 46,740 feet to run

in 30 minutes. Deduct $1\frac{1}{2}$ minutes' time lost in getting under way after casting off (41) leaves $28\frac{1}{2}$ minutes $\frac{46740}{28.5} = 1,640$ feet in one minute or 16 knots an hour.

The St. Johns was at Craven Shoal not later than 4.16 (p. 40). From Craven Shoal to No. 13 is $1\frac{3}{16}$ knots or 7,220 feet and at 1,640 feet in one minute would take $4\frac{1}{2}$ minutes to run. This would make it "not later" than **4.20** P. M. when the St. Johns passed the **"tramp"** steamer Holberg just below No. 13.

To show that the same time was **worked out by Claimant's counsel** I quote from pp. 18 and 19 of his brief in the Circuit Court:

"Admitting that a short interval elapsed from the time "Hulphers saw the steamship, till she was on a line from Castle "William to Bedloe's Island, it is submitted that the latest "time consistent with his testimony is 3.30.

"Thence to Craven's Shoal it is $6\frac{3}{8}$ nautical miles.

"Taking the steamer's speed at 9 knots and giving her but one "knot ebb current, her time at Craven's Shoal would be 4.08."*

"Here she was set half speed (6 or $6\frac{1}{2}$ knots.)†

"The ebb tide, which she carried strong *to the tail of the* "*bank*, gave her seven knots speed.‡

"At that, in 10 minutes 43 seconds, she would make the next "mile and a quarter—**to ¼ mile below Buoy 13—at "4.19."**

Libellant's counsel (while admitting that the "Holberg," was the "tramp" steamer which the St. Johns passed a little below buoy No. 13) printed at the foot of p. 31 of his brief in the Circuit Court, the following.

"The St. J. was at No. 13, between **4.18** and **4.20."**

But for some unexplained reason the Circuit Judge (while finding (9th Fdg., p. 52) that "from a little below No. 13 to "the point of collision is 4,500 feet," and that the Holberg ran "that distance at a speed of 4 knots *over the ground*, *i. e.*, in "$11\frac{1}{4}$ minutes)," utterly failed to find the hour and minute the Holberg was at "*a little below No. 13.*" If the Circuit Judge had accepted the time given by both counsel, *i. e.*, 4.19 and added to it the $11\frac{1}{4}$ minutes, he would have found that the Holberg could not have been in collision before **4.30** P. M. instead of **4.26** P. M., or rather he would have found that the speed of the Holberg was much greater than "4 knots over the ground" in order to reach the point of collision at the fixed time 4.26 P. M.

Libellant's counsel summarized the situation to the Circuit Court, as follows:

"The 'St. John' passed No. 13 at 4 h. 19 m., or 4 h. 20 m., "and as No. 13 is $\frac{3}{4}$ k. from No. 11, and the wreck is $\frac{1}{4}$ k. S. of "11, and as the 'Holberg' was *below* No. 13 when the 'St. "J.' passed her, she had *less* than a mile to run in about 6 "minutes."

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* This is an error of computation: $6\frac{3}{8}$ knots at the speed of 10 knots (*i. e.* 1 knot current + 9 knots speed) takes $38\frac{1}{4}$ minutes which added to 3.30 P. M. makes it $4.08\frac{1}{4}$ P. M.

† *Claimant's counsel did not claim as much* for half speed, as the Court gave him. He was right.

‡ The Court found (6th Finding, 51): "She carried the ebb tide with her from "Bedloe's Island *to a little below the forts.* After a brief period of slack water "and until the collision there was a flood tide."

The place of the collision was about 1/4 of a mile S. E. of Buoy No. 11.

The **1st Exception** (p. 55) is to the refusal to **amend** the 2d Finding (p. 50) as requested (1st Amdt., p. 53) by finding how far to the southard and how far to the eastward of buoy **No. 11** the collision occurred in place of the *expression* "*a little*," and the exception states that the collision occurred between 600 and 1,500 feet south of buoy No. 11 and between 1,500 and 3,000 feet to the eastward of it (p. 55).

The **31st Exception** (p. 58) is to the refusal to find that part of libellant's second proposed finding (p. 49) which states that "*the collision happened about a quarter of a mile to the* "*southard and eastward of buoy* **No. 11,**" on the ground that said finding was material and is conclusively established.

The **33d Exception** (p. 58) is to the refusal of the Court to find that part of libellant's fifth proposed finding (p. 49) which states that "*the distance from the fort to the place of collis-* "*ion is* **3¾** knots," on the ground that the same is material and is conclusively established.

The **6th Exception** (p. 56) is to the refusal to **amend** the 6th Finding (p. 51) as requested (6th Amdt., p. 56) by striking out the words "*a little over* 3½," and inserting 3⅝ knots, or by indicating how much over 3½ knots is intended by the expression "*a little over.*"

The above exceptions may be grouped and considered together.

A manifest, and *most unfair*, attempt has been made by the Circuit Judge to both shorten the distance and lengthen the time of the Holberg. In other words, time and space were the *physical facts* opposed to the witnesses of the Holberg, who swore to her slow speed from the Narrows to the collision, and these *insurmountable* obstacles had to be overcome, and the only way was to use Procrustes' bed to each.

The **2d Finding** (50) fixes the **middle of the channel** as the place of collision, by the statement "While proceeding "up **about in the middle of the main ship chan-** "**nel** and when *a little* to the southard and eastward of buoy

"**No. 11,** at about 4.26 p. m., she was run into by the steam-"ship." Opposed to this is the **9th Finding** (p. 52), which speaking of the Holberg says: "Proceeding down the channel, "keeping upon the *starboard side*, as near the channel buoys "as she could safely go."

The following evidence fixes the place of collision as the middle of the channel, about one quarter of a knot southeast of buoy **No. 11.**

The chart shows where the wreck of the "Quickstep" lies—¼ of a mile almost directly south of buoy **No. 11.**

The only *outside* witnesses of the *place* of collision were Capt. Axelsen and Pilot Johnson of the bark Aristos. **Axelsen** says (47), that at 4.30 p. m. (4 minutes after the collision), he passed the Quickstep, which was then "*sinking*" (not sunk); the water over her deck; that the tug was then *alongside* on her starboard side; (her port side was her wounded side and she would list to port as the water flowed in); the steamer was then a cable length (100 fathoms=600 feet) off.

Johnson says (48) the Aristos, drawing 17½ feet, passed right astern of the Quickstep in the **centre of the channel,** and only *fifteen* feet from the stern of the Quickstep which was then *heading* in shore. The tug boat was then hanging close alongside, and some men were forward on the Quickstep, which was not moving at the time. That he saw buoy **No. 11** as he got close to the Quickstep, and when abreast of the Quickstep, buoy **No. 11** bore **NORTHWEST** from the Aristos. It is true he adds: "The bark was then hardly her "length from buoy No. 11," but this is a mere estimate of distance and is contrary to his statement that the Aristos was "in the centre of the channel."

> **Note.** A sailor's bearing is an *exact* thing. This pilot knew the compass as well as a bird knows its nest. He knew the channel courses, and knew buoy No. **11** and when he said it bore *northwest*, it was impossible that it bore west, and if it bore northwest when the Aristos was in the centre of the channel and abreast of the Quickstep, and within 15 feet of her stern, it bore northwest from the Quickstep.

The set of the tide was southwest [Judge Lacombe (6th Finding, p. 51) and Judge Brown speaks (p. 63) of "*The southwest*

erly current"], and if the tide in the 4 minutes had overcome her momentum sufficiently to change her position, her movement was in the *direction* of the set of the tide, *i. e. southwest*, which would make the place of collision still further to the eastward and an *equal* amount to the northward. The 6th Finding states that this current "*helped a vessel going out* "*about ½ a knot and a vessel coming in about a knot an hour*," a *paradox* of a startling character. I should like to see a "*parallelogram of forces*" constructed to prove it.

Judge Brown made an equally astonishing and absurd statement when he said (p. 63): "The place of collision was prob-"ably very near buoy **11,** the *southwesterly* current carrying "the bark afterwards more *southerly* to the point where she "grounded." If the south*westerly* current ran *south* (and not westerly as well) such a statement might be accepted, but as the bark grounded ¼ of a mile south of No. **11,** the *southwesterly* current, to get her *there*, must have commenced the job ¼ of a mile east of No. **11**—and we then should have an isosceles right-angled triangle, the hypotenuse of which represents the path the S. W. tide would carry the Q. from the collision to the time she sank.

Judge Brown also said (p. 61): "It is to be noted, though I "do not lay great stress upon this circumstance, that although "the channel way was three-quarters of a mile wide, these ves-"sels at the time of collision *were very near the westerly side.* "This is the more *peculiar* as respects the tug and bark, in-"ward bound, since if there was no fog and both shores could "be seen, as they allege, their direct and *natural* course was "apparently on the *easterly* side of the channel."

This "*peculiarity*" (if it be one) is shared by the Aristos and her tug, which came over the same course. But the peculiarity did not exist.

Capt. McDevitt, of the tug Leonard Richards, testified (22): "At this time *I was about the middle of the channel.*"

> **Note.**—The bark *drew* 20 feet (3d Finding, p. 51), that is, to her load line, and she was *sinking*, with the water right over her decks, when the Aristos went by her (47), and she finally grounded slightly to the westward of south of No. **11,** in 25 feet of water (2d Fdg., p. 51).

Capt. **McDevitt**, of the tug, says (p. 22): "After the "collision" (the Holberg had struck the hawser and parted it,

before hitting the bark) "we rounded to and went right back "to the bark and gave them our hawser, and I towed her "to the *westward* to get her *out of the channel* before she "sank. * * I came back to the bark, and threw a "heaving line to the bark, and then they hauled in our "hawser, because we were in a hurry. We held her as short "as we could. Then I towed her in (23) till she took the "ground. I think I must have towed her half a mile or three-"quarters before she sank. We towed her very fast. We "were in a hurry to get her in before she sank *in the channel*. "We didn't get her in any too soon. I think it might be "fifteen or twenty minutes after the collision that she "sank" (23).

The **log of the Holberg** (p. 29) has this entry: "Soon "after the collision the fog lifted somewhat, and the bark was, "so far as we could see, **being towed into shallow "water**, in a sinking condition."

McCarthy, 2d mate of Q., says (p. 10): "He towed us "about ten minutes."

Capt. **McDevitt** says (p. 22): "The direction" (we pulled) "from the place where the collision happened was, I should "judge, about **northwest**. We were heading to get as "close to the West" (Bank) "as we could, as quick as possi-"ble, to get to the shoalest water."

> **Note.**—Pilot Johnson, of the Aristos, says that when he passed abreast of the *stern* of the Quickstep, No. 11 bore **northwest** (p. 48), and that the tug was alongside and not moving then (p. 48).

McDevitt (p. 23): "After the collision, the tug John Smith "towed a bark or a brig up past. I could tell the boat plainly "from the place where we were lying. That was after the "collision *when I* had to pull the Quickstep to the west*ward*."

> **Note.**—This was the bark Aristos, which passed the Quickstep in mid-channel with her stern hanging off" (p. 48).

Capt. **Morrison**, of the Q. (p. 13): "After the collision "the pilot ordered the tow" (tug) "back and asked for his "hawser, and it was made fast, and she towed us to the upper

"edge of the West Bank, where the bark took the ground in "twenty-five feet of water."

Pilot **Wood**, of the Q., says (19): "The collision hap- "pened * * right to the **eastward of where she** "**laid ashore**. * * (p. 20) the bark didn't sink there; "she sank just to the **west**. I sang out to the tug to go ahead "and I ran her in. * * I suppose there was 38 feet of water "where she struck us. We were towed after the collision about "two lengths of the ship to the westward. She was settling "fast. * * **The collision was right in the center "of the channel."**

Mapes. pilot of the Holberg, says (43): "The place of the "collision was just south of buoy **11,** at the tail of the bank" (*i. e.*, buoy No. 11 is at the tail of the bank) [Warren, p. 42].

Capt. **Warren**, of the St. John (p. 39): "Sometime between "6 and 7 I passed the West Bank coming back. I saw the "bark. She was lying there *just* **by** *the channel*. We almost "ran on top of her spars when we saw her. She lay just a "short distance below buoy **11.** She lies a little west of a "line, I should judge, bearing S. by W. from buoy **11,** just "off the *bearing* of a S. by W. course."

Capt. **Busch**, of the Holberg, says (p. 36): "After we got "clear, then we got *aground*, *, * then we saw a buoy, "and the pilot said to me, '*That is No. 11 buoy.*' That buoy "was *off from* where the collision happened, three or four "lengths, I think" (*i. e.*, 600 to 800 feet).

The above is the *evidence* as to the place of the collision, and demonstrates that the place of collision was not further north than abreast of the wreck-buoy, or 3½ knots south of Quarantine Station, **on a straight line.**

THE SPEED OF THE HOLBERG AS FOUND BY THE CIRCUIT COURT.

The **3d, 4th** (55), **12th, 13th, 14th, 15th** (56), **16th, 17th, 18th** (57), **34th** & **35th** (58) **Exceptions,** all relate to the findings and parts of findings as to **the speed of the Holberg.**

For convenience I group these exceptions and compile the narrative of the findings interpolating, in *italics*, the exceptions.

The Holberg started from Pier 15, East River (south side of Wall St.), between 3.05 and 3.15 P. M. (5th Fdg.).

She ran slow out of the East River, but soon increased to full speed (5th Fdg., 51).

She was off Bedloe's Island (6th Fdg.) between 3.27 and 3.32 (*5th Ex., 56* **after** *3.32*).

It was nearly 4 o'clock (*7th Ex., 56;* **after** *four o'clock and about 4.05*) when she reached Fort Lafayette (6th Fdg.).

Fog prevailed between the Narrows and buoy No. 11 (7th Fdg.) (**Dense** *fog 8th & 10th Ex., 56*).

The Holberg ran into this fog about the time she passed the forts (8th Fdg.) (*12th Ex., 56* **before** *she passed the forts*).

The Holberg **did not reduce her speed** when she ran into the fog, about the time she passed the forts (8th Fdg.), nor until some distance (8th Fdg.) (15th Ex., 53. *What distance is intended by "some distance" below the forts?*)

Then she reduced to **half speed only** and did not further reduce her speed until about buoy No. 13 (8th Fdg.). (*13th Ex., 56. The Holberg did not reduce her speed* **below** *the forts to half speed*).

The further reduction of speed of the Holberg about buoy No. 13 was to *dead* slow (5th Fdg.). (*4th Ex., 55. The Holberg did not reduce to* **half speed** *nor to* **dead slow**).

The Holberg's full speed was 9 to 9½ knots.

" " half " " 6½ to 7 "

" " dead slow " about 3½ knots (5th Fdg.). (*4th Ex. 55, was less than 3½ knots*).

She had been running at (dead slow) 3½ knots for probably not more than 4 or 5 minutes before the collision (5th Fdg., 51). (*4th Ex., 55 not so*):

By the time she had reached a point a little below buoy No. 13 *(16 Ex., p. 57)* **she had slowed down to about 4 knots OVER THE GROUND** (9th Fdg., 52). *(17th Ex., p. 57 : not true.)*

From that point (*i. e.* a little below buoy No. 13) to the place of collision, **a distance of about 4,500 feet,** she did not increase her speed (*18th Exception*, 57. *Material, and not true as to increase of speed*).

> **Note 1.** To run 4,500 feet at the rate of four knots *over the* ground takes $11\frac{1}{4}$ minutes and as the collision was at 4.26 P. M. (2d Fdg.) the Holberg must have been at the point of beginning of the 4,500 feet, at $4.14\frac{3}{4}$ P. M. *and she wasn't there.* (See page 35 of this Brief).

> **Note 2.** 4,500 feet is $\frac{3}{4}$ of a knot. From No. 13 to No. 11 is $\frac{3}{4}$ of a knot. The collision, therefore, must have occurred the same distance *below* No. 11 as is intended by "*a little* **below** *No. 13.*"

The distance from Fort Lafayette to the place of collision is a **little over** $3\frac{1}{4}$ knots (6th Fdg., p. 51). *(6th Exception. The true distance was $3\frac{3}{8}$ knots, equal to 20,520 feet).*

> **Note.** A knot or nautical mile equals 6,080 feet. As 60 minutes = 1 hour—a knot an hour = 101 + ft. in 1 minute, 2 knots = 202 ft., &c., &c. Over $3\frac{1}{8}$ knots = over 19,000 feet.

The collision occurred at about 4.26 P. M. (2d Fdg.) **a little** to the southward and eastward of buoy No. 11 (2d Fdg., 50). (*1st Ex., 55. It occurred between 600 and 1,500 feet south of No. 11 and between 1,500 and 3,000 ft. to the east of No. 11.*)

The POSSIBLE Speed of the Holberg.

The **pitch** of her screw was 14 ft. 2 inches (5th Fdg., 51). This means that if moving through a solid medium, one turn of it would cause it to advance $14\frac{2}{12}$ ft. Of course there is a percentage of **slip** in water—which reduces the amount of advance.

At full speed she made 69 to 71 revolutions (5th Fdg., 51).

71 times $14\frac{2}{12}$ = 1,005 ft. or 10 knots an hour *without allowance for slip.*

She was carrying 83 to 84 pounds pressure of steam ; 80 pounds is the highest pressure allowed (Chief Engineer Eide, of the Holberg, 32), and **she was not blowing off steam when going slow** (Mapes, 45, *71*).

Nota Bene. If not blowing off steam **she must have been using it all,** and, therefore, consuming all the steam needed to give 71 revolutions.

No attention was paid by the Circuit or District Judge to this **most significant fact.**

At half speed she made from 40 to 45 to 50 revolutions per minute (5th Fdg., 51). 50 times $14\frac{3}{12}$ feet = **7,080** ft. or **7** knots an hour, *less the slip of the screw.*

At slow speed she made from 20 to 25 to 26 revolutions per minute (5th Fdg., 51), and Judge Lacombe finds she was going **dead** slow (5th Fdg., 51), which must mean 20 times $14\frac{3}{12}$ = 283 feet per minute or $2\frac{8}{10}$ knots per hour **less the slip of her screw.**

The **claimant's** proctor printed in his brief in the Circuit Court an extract from "Mackrow's Pocket Formulae for 'Naval "Architects' (p. 191), the following table of coefficients of per-"formance of some of her Majesty's vessels:"

Name of Vessel.	Length.	Displacement.	Velocity in knots.	Slip in knots.	Percentage of slip.
Algiers	218.7	4730	9.000	.545	.0605
Sirius	212.	1554	10.897	.857	.0786
Albion	204.	2912	8.888	.704	.079
Lion	192.	3580	9.529	.877	.0815
Dryad	187.	1546	10.177	.293	.0290

The claimaint's counsel added: "*The average percentage of "slip on all the above is .0649,*" which is $6\frac{1}{2}$ per cent., and would make the Holberg's calculated speed as follows:

Full speed: 10 k. less $6\frac{1}{2}\%$ = $9.\frac{35}{100}$ k.
Half speed: 7 k. " " = $6.\frac{55}{100}$ k.
Dead slow: $2\frac{8}{10}$ k. " " = $2.\frac{62}{100}$ k.

THE STORY OF THE HOLBERG'S WITNESSES.

Judge Lacombe said (p. 66): "The evidence of those on the "Holberg must be * * in part *discredited*—either the fog pre- "vailed for a time *much* less than they say it did, **or she ran** "**full speed** *for some time* after it shut in."

The **Connecticut,** 45 F. R., 379, Benedict, J.: "But all "familiar with litigation of this character know that mere desire "for the success of their ship in a litigation affords motive "sufficient to induce seamen not only to make false statements "under oath, but sometimes *to falsify the log.*"

The **Velasquez,** L. R. 18, P. C. A. C., 500, Sir Jas. W. Colville: "The evidence, however, cannot be taken to be wholly "true or correct. *For all these witnesses concur* in representing "the bark as on the starboard bow of the steamer, whereas their "Lordships have found, upon the other evidence in the cause, that "the vessels were approaching each other port-side to port-side. "*If the crew and the pilot have combined consciously to put* "*forward a false case*, all that can be said is that the owners "have failed to show by trustworthy evidence that the fault was "exclusively the fault of the pilot."

The **City of Cleveland,** 56 F. R., 728, H. B. Brown, J.: "It is a notorious fact that seamen in collision cases are very "strongly biased in favor of their own vessels, in favor of the "parties who call them, and I don't think their testimony in "regard to disputed facts is of any great weight *as against the* "*probabilities of the case.*"

The Circuit Court found (7th Fdg.) that "this fog prevailed "between the Narrows and the buoy No. 11," and so all the crew of the Holberg testified and were corroborated *as to the Narrows* by Lighthouse Keeper Davie (p. 48) and Corporal Wright (p. 48) at Fort Tompkins light, and *as to all the distance* by Capt. Warren of the St. Johns (38). The lie of the Holberg's witnesses is as to her speed in this fog.

That she was at **Quarantine Station** shortly **after** 4 P. M. is proved by her crew. Ch. Mate **Busch** says (29) that Second Mate Johnson went down for his coffee *before* the fog came, when the Holberg was abreast of Quarantine, **at a little after four o'clock.** Second Mate **Johnson** says (24) *when he went down to get his supper the Holberg was about*

abreast of Quarantine Station, that he was below about **five minutes,** and when he came on deck again (26) that he couldn't *see* anything, but that, in his opinion, *she was abreast of the fort in the Narrows.*

> **Note.**—Pilot **Mapes** says (p. 44) he *heard the fog bell on Fort Lafayette.* So could Johnson, and when he says he was *off Quarantine* when he went below and was *off the fort* when he came on deck again, *and was below about five minutes,* he shows that the Holberg did not pass the forts *before* 4.05 P.M.

A circumstantial fact, *almost conclusive,* is that the Wheelsman Suckow (p. 35) was relieved by Asmundsen (p. 33) "**before** the Holberg arrived at Quarantine Station," and the watch and wheel are changed at 4 P.M. (8 bells) as Pilot Mapes says (p. 46).

The **statement of defence** (p. 24) states the Holberg was **approaching** the Narrows at about 4 P. M. The **answer** (5) alleges fog *inside* the Narrows. The **Log** (p. 28) states: "at about 4 P.M. *dense fog* set in."

There is most exact and controlling outside evidence of the Holberg's movements.

Three steamers, the "Old Dominion," "Wyanoke" and "St. Johns" passed her at different points, and fix her time and speed by their own movements.

Table of Distances.

From Quarantine Station to Fort Lafayette, is	$\frac{1}{2}$ knots	= 3,040 ft.		
" Fort Lafayette to Craven's Shoal,	" $1\frac{1}{8}$ "	= 6,840 "		
" Craven's Shoal to Buoy No. 13,	" $1\frac{3}{16}$ "	= 7,220 "	$3\frac{5}{16}$ knots =	
" No. 13 " " " 11,	" $\frac{3}{4}$ "	= 4,560 "	**20,140 ft.**	$4\frac{7}{8}$ knots =
" " 11 to Quickstep Buoy,	" $\frac{1}{4}$ "	= 1,520 "		29,640 ft.
" Quickstep Buoy to No. 8,	" $1\frac{9}{16}$ "	=	9,500 ft.	
" Pier 26, N. R., to Fort Lafayette,	" $7\frac{1}{8}$ "	= 43,320 ft.		
" Fort Lafayette, to No. 8,	" $4\frac{7}{8}$ "	= 29,640 "		
" " " " " 13,	" $2\frac{5}{16}$ "	= 14,060 "		
" Pier 26, N. R., to No. 8,	" 12 "	= 72,960 "		
" " 8, N. R., to Bay Ridge, Buoy No. 18,	" $4\frac{3}{8}$ "	= 26,600 "	scant.	
" Bay Ridge, Buoy No. 18 to Ft. Lafayette,	" 2 "	= 12,160 "	"	

" No. 8 to Wreck Buoy, is 9,500 ft.

" " 8 " No. 11, is 11,020 ft.

" " 8 " " 13, " 15,580 "

" " 8 " Craven's Shoal, is 22,800 ft.

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The Old Dominion's Movements.

The Old Dominion left Pier 26, North River, at the foot of Beach street, at **3.23** P. M., and passed buoy No. 8 at **4.26** P. M. The interval is 63 minutes, and the distance 12 knots = 72,960 feet. Therefore her average speed was $\frac{72,960}{63}$ = 1,154 feet per minute. As the O. D passed the forts at 4 P. M. (p. 18) and the distance from Pier 26 is 43,320 feet, she made $\frac{43,320}{37}$ = 1,171 feet per minute.

As the distance from the forts to buoy No. 8 is 29,640 feet and she made it at 4.26 P. M. (p. 18), *i.e.*, in 26 minutes, her average speed was $\frac{29,640}{26}$ = 1,140 feet per minute, the difference in speed being due to the fact that she had the last of the ebb to the Narrows.

At	4.00	P. M.	the	O. D.	was	at Ft. L.,	29,640	ft. from No. 8 buoy.
"	4.01	"	"	"	"		28,500	" " "
"	4.02	"	"	"	"		27,360	" " "
"	4.03	"	"	"	"		26,220	" " "
"	4.04	"	"	"	"		25,080	" " "
"	4.05	"	"	"	"		23,940	" " "
"	4.06	"	"	"	"		22,800	" " "
						(Craven Shoal.)		
"	4.07	"	"	"	"		21,660	" " "
"	4.08	"	"	"	"		20,520	" " "
"	4.09	"	"	"	"		19,380	" " "
"	4.10	"	"	"	"		18,240	" " "
"	4.11	"	"	"	"		17,100	" " "
"	4.12	"	"	"	"		15,960	" " "
						(Buoy No. 13.)		
"	4.13	"	"	"	"		14,820	" " "
"	4.14	"	"	"	"		13,680	" " "
"	4.15	"	"	"	"		12,540	" " "
						(At buoy No. 11.)		
"	4.16	"	"	"	"		11,400	" " "
"	4.17	"	"	"	"		10,260	" " "
						(Passed place of collision.)		
"	4.18	"	"	"	"		9,120	" " "
"	4.19	"	"	"	"		7,980	" " "
"	4.20	"	"	"	"		6,840	" " "
"	4.21	"	"	"	"		5,700	" " "
"	4.22	"	"	"	"		4,560	" " "
"	4.23	"	"	"	"		3,420	" " "
"	4.24	"	"	"	"		2,280	" " "
"	4.25	"	"	"	"		1,140	" " "
"	4.26	"	"	"	"		0	At buoy No. 8.

The Wyanoke's Movements.

The Wyanoke left Pier 26, N. R., at 4.27 P. M., and passed No. 8 buoy at 4.32, an interval of 65 minutes, in which she ran 12 knots or 72,960 feet, which is an average of $1,122\frac{24}{100}$ feet in one minute.

From Pier 26, N. R., to Ft. Lafayette is $7\frac{1}{8}$ knots = 43,320 feet, and at the average rate of $1,122\frac{1}{4}$ feet in one minute, the W. would take $38\frac{6}{10}$ minutes and would be at Ft. L. at 3.27 P. M. + $38\frac{6}{10}$ minutes = $4.05\frac{6}{10}$ P. M.

But the Wyanoke was only four minutes behind the Old Dominion and had the benefit of the ebb tide, which helped the Old Dominion 31 feet a minute. Giving the Wyanoke the same allowance, her speed over the ground would be 1,153 feet a minute—and she would take $37\frac{1}{2}$ minutes—and would pass the forts at $4.04\frac{1}{2}$ P. M. and would have $27\frac{1}{2}$ minutes to reach No. 8 buoy, which is 29,640 feet south of Ft. L., and her average speed would be 1,080 feet per minute.

At	4.04½	P. M.	the	W.	was	at	Ft. L.,	29,640	ft. from No. 8 buoy.
"	4.05	"	"	"	"		29,100	"	" "
"	4.06	"	"	"	"		28,020	"	" "
"	4.07	"	"	"	"		26,940	"	" "
"	4.08	"	"	"	"		25,860	"	" "
"	4.09	"	"	"	"		24,780	"	" "
"	4.10	"	"	"	"		23,700	"	" "
"	4.11	"	"	"	"		22,620	"	" "
"	4.12	"	"	"	"		21,540	"	" "
"	4.13	"	"	"	"		20,460	"	" "
"	4.14	"	"	"	"		19,380	"	" "
"	4.15	"	"	"	"		18,300	"	" "
"	4.16	"	"	"	"		17,220	"	" "
"	4.17	"	"	"	"		16,140	"	" "
							(No. 13.)		
"	4.18	"	"	"	"		15,060	"	" "
"	4.19	"	"	"	"		13,980	"	" "
"	4.20	"	"	"	"		12,900	"	" "
"	4.21	"	"	"	"		11,820	"	" "
							(No. 11.)		
"	4.22	"	"	"	"		10,740	"	" "
"	4.23	"	"	"	"		9,660	"	" "
							(Wreck buoy.)		
"	4.24	"	"	"	"		8,580	"	" "
"	4.25	"	"	"	"		7,500	"	" "
"	4.26	"	"	"	"		6,420	"	" "
"	4.27	"	"	"	"		5,340	"	" "
"	4.28	"	"	"	"		4,260	"	" "
"	4.29	"	"	"	"		3,180	"	" "
"	4.30	"	"	"	"		2,100	"	" "
"	4.31	"	"	"	"		1,020	"	" "
"	4.32	"	"	"	"		0	"	" "

The St. Johns' Movements.

As No. 13 is 15,580 feet from No. 8, and the St. J., at 4.20, passed the Holberg a little below No. 13,

At 4.20 P. M. the St. J. was a little less than							15,580	ft.	N. of	No. 8.
" 4.21	"	"	"	"	"	"	13,930	"	"	"
" 4.22	"	"	"	"	"	"	12,280	"	"	"
" 4.23	"	"	"	"	"	"	10,630	"	"	"
							(No. 11.)			
" 4.24	"	"	"	"	"	"	8,980*	"	"	"
" 4.24½	"	"	"	"	"	"	8,155	"	"	"
" 4.25	"	"	"	"	"	"	7,330	"	"	"
" 4.26	"	"	"	"	"	"	5,680†	"	"	"

Note.—At 4.20 P. M. the St. J. was a "*little below*" No. 13. If the "little below" was as much as 580 feet, the St. J. was 15,000 feet north of No. 8. The Wyanoke, at 4.20 P. M., was 12,900 feet north of No. 8, and therefore was 2,100 feet nearer No. 8 than the St. J.

At 4.24 the St. J. was abreast of the W. and 8,400 feet from No. 8. The difference of their speed (1,650 - 1,080) was 570 feet, and in four minutes the St. J. would overtake the W. 2,280 feet.

The Quickstep's Movements.

Pilot Wood says (p. 19) the Quickstep passed the Old Dominion just after turning buoy No. 8, about half way between No. 8 and No. 14 and passed the Wyanoke abreast of No. 14 and the St. Johns half way between the two other steamers.

As the Old Dominion passed No. 8 at 4.26, and the Quickstep was in collision 9,500 feet north of No. 8 at 4.26, the Quickstep must have passed the Old Dominion at a point north of No. 8.

The Circuit Court made no finding as to the speed of the Quickstep. **McDevitt,** capt. of the tug, said (p. 22) "We "could'nt tow the vessel over 5 knots." Mate Johnson, of the Holberg (25), judged the speed of the Quickstep was 7 or 8 knots. There was a "stiff southerly breeze" (6th Fdg., p. 51).

* As Quickstep buoy is 9,500 feet north of No. 8, the St. J., at 4.24, was 520 feet south of it.

† As the Quickstep wreck buoy is 9,500 feet north of No. 8, the St. J. was 3,820 feet plus the "little below" south of the collision when it occurred.

There was a flood tide "which helped a vessel coming in about "one knot an hour" (6th Fdg.).

Assuming that the stiff southerly breeze helped the Quickstep one knot, the flood tide one knot, and the tug 5 knots, her speed over the ground would be 7 knots an hour or 700 ft. in one minute.

Let **x** equal the speed per minute of the Quickstep.

As the St. Johns passed buoy No. 11 at 4.23 p. m. and did not sight the Quickstep till after passing No. 11, and as she was in collision at a point 1,520 ft. south of No. 11 at 4.26, she must have been 1,520 ft. + 3 **x** south of No. 11 when the St. John sighted her.

Assume that **x** = 700 ft.—then,

At 4.20 P. M. the Quickstep was				5,300	ft.	north	of	No.	8	buoy.	
" 4.21	"	"	"	" 6,000	"	"	"	"	"	"	
" 4.22	"	"	"	" 6,700	"	"	"	"	"	"	
" 4.23	"	"	"	" 7,400	"	"	"	"	"	"	
" 4.24	"	"	"	" 8,100	"	"	"	"	"	"	
" 4.24½	"	"	"	" 8,450	"	"	"	"	"	"	
" 4.25	"	"	"	" 8,800	"	"	"	"	"	"	
" 4.26	"	"	"	" 9,500	"	"	"	"	"	"	
				in collision—east of wreck buoy.							

At 4.23 P. M. the Quickstep would be (1,520 ft. + 2,100 ft.) 3,620 south of the St. Johns, the St. Johns would be at No. 11 and approaching the Quickstep at the rate of 1,650 ft. in one minute, and the Quickstep approaching the St. Johns at the rate of 700 ft. in one minute, so that they would be 2,350 ft. nearer (*i. e.*, only 1,270 ft. apart) at 4.24 and would pass at about 4.24½.

This is entirely consistent with Capt. Warren's testimony (p. 42) and harmonizes with the time of the collision (4.26 P.M.) and the movements of the St. Johns and her rate of speed, and the conceded fact that she passed the Holberg a little below No. 13, which it is demonstrated she did, between 4.19 P. M. and 4.20 P. M.

The Holberg's Movements.

She was north of Quarantine *before* 4 P. M. and had changed her wheelsman before arriving at Quarantine (Asmundsen, p. 33), and therefore had from 5 to 6 minutes to run the $\frac{3}{4}$ of a mile from *above* Quarantine to Ft. Lafayette. Her full speed was 9 to $9\frac{1}{2}$ knots (5th Fdg.), and she could therefore run the $\frac{3}{4}$ of a mile in 5 minutes and reach Ft. Lafayette about $4.04\frac{1}{2}$ P. M.

She was passed *inside* the Narrows by the Wyanoke (p. 13) which did not pass the forts before about $4.04\frac{1}{2}$ P. M.

As the Holberg passed the forts about 4.05 she had about 15 minutes to run the 14,340 ft to "a little below" No. 13, where the St. John passed her between 4.19 and 4.20 P. M. This she could do at the rate of $9\frac{1}{2}$ knots an hour.

At the rate of 950 ft. in one minute, at

$4.04\frac{1}{2}$	P.M.	the Holberg	was	abreast	of the Wyanoke	inside Ft. L.
4.05	"	"	"	"	Ft. L.	
4.06	"	"	"	950 ft.	S. of Ft. L.	
4.07	"	"	"	1,900 "	"	"
4.08	"	"	"	2,850 "	"	"
4.09	"	"	"	3,800 "	"	"
4.10	"	"	"	4,750 "	"	"
4.11	"	"	"	5,700 "	"	"
4.12	"	"	"	6,650 "	"	"
4.13	"	"	"	7,600 "	"	"
4.14	"	"	"	8,550 "	"	"
4.15	"	"	"	9,500 "	"	"
4.16	"	"	"	10,450 "	"	"
4.17	"	"	"	11,400 "	"	"
4.18	"	"	"	12,350 "	"	"
4.19	"	"	"	13,200 "	"	"
4.20	"	"	"	14,150 "	"	"
			(A little below No. 13.)			
4.21	P.M.	the Holberg	was	15,100 ft.	S. of Ft. L.	
4.22	"	"	"	16,050 "	"	"
4.23	"	"	"	17,000 "	"	"
4.24	"	"	"	17,950 "	"	"
4.25	"	"	"	18,900 "	"	"
			(Below No. 11.)			

4.26 P.M. the Holberg was 19,850 ft. S. of Ft. L. and in collision.

The Buoys and Steamers seen by the Holberg.

Capt. **Warren**, of the St. Johns, says (p. 41): The buoy I *saw* next after passing Craven Shoals was buoy No. 13. I passed on the *east* side of it, and (p. 39) we passed the tramp steamer (Holberg) on the starboard, about abreast of No. 13, or probably a little below that (p. 40), not a hundred yards off and (p. 41) to the westward of her; and (p. 42) the *tail* of the bank is No. 11.

Pilot **Mapes**, of the Holberg, says (top p. 46): I *saw* a buoy just as we passed the *tail* of the bank, on the starboard side, *and that was the only buoy I saw;* and (bottom p. 46) the Holberg passed 40 feet off buoy No. 13, to the eastward of it; and (p. 42) the *elbow* of the bank is No. 13; and (p. 43) the place of collision was just south of buoy No. 11 at the *tail* of the bank.

If Mapes has not invented the above, his estimate of 40 feet is worse than a mere guess—for he did not see No. 13—and as the St. J. passed him to the west and 300 feet off, and also passed buoy No. 13 to the east of it and *did see it*, the Holberg must have been much more than 300 feet to the east of No. 13 instead of 40 feet. As it was buoy No. 11 at the *tail* of the west bank that Mapes *saw*, and as it is probable that it is the one he judged to be only forty feet off, the natural thing for him to do, *bound out through the Swash Channel* as he was (p. 46), and having to make No. 8 buoy was to starboard his helm and draw over to the centre of the channel, and in doing so he would be heading just as those on the tug and Quickstep say he was; *to show the starboard side of the Holberg.* (McDevitt, p. 23: I could see her whole starboard side; Wood, p. 19: I could see her starboard side right ahead).

Mapes saw the Old Dominion and Wyanoke (bottom p. 43) *before going into the thick fog*, but does not remember seeing any other (top p. 44).

Capt. **Busch** did not see any vessels going down the same way he was (p. 37); before hearing the tug's whistle, heard whistles on his *port* side (*i. e.*) to eastward of him (p.37).

Mate **Busch** (p. 27), about ten minutes after the fog set in, heard a whistle very near, *nearly abreast*, and speaks of it as being on the *port* side.

> **Note.** As the St. J. passed the H. on her starboard side, these two witnesses must be again mistaken *if* the whistle was the St. J.'s. **But the principal comment** I make is that neither of them *saw* the St. Johns, which saw the H. so *indistinctly*.

Ericksen, seaman of the Holberg (p. 34), was aloft and *saw* a passenger boat pass the Holberg on the *starboard* side—*saw that steamer as soon as fog set in*—she was a good ways off.

> **Note.** The Wyanoke passed the Holberg inside of the Narrows, to the westward (*i. e.*, on her starboard side, p. 13); and about ½ of a mile (760 feet) off. This would correspond with the vessel Ericksen saw "*as soon as the fog set in*," and agree in position and distance with his description.

THE NEW TRIAL OF AN ADMIRALTY APPEAL.

The **27th** and **30th Exceptions** are to the Rule of Law adopted by the Circuit Judge and expressed in his opinion as follows: (p. 66.)

"**Some** of the witnesses who testified on this branch of the "case were examined before the District Judge. His decision "*therefore* is affirmed."

The appellant's counsel knows of and pays due respect to the decision of this Court that an exception will not lie to the *opinion* of the Circuit Judge, but the Circuit Judge refused the finding proposed in the **20th Amendment** (p. 54) on the ground (p. 67) that such a finding "is not contemplated "by the Act of 1875. That act does not require the Circuit "Judge to set forth among the findings and conclusions some "small isolated fraction of the entire mental process by which "as a trier of the facts *he reached a conclusion touching the* "*weight of conflicting evidence*."

By refusing the finding the Circuit Judge deprived the libellant of the benefit of an exception to it, and nothing was left but to except to the refusal to find and to the opinion.

The Circuit Judge was bound to try the libellant's appeal in accordance with the rules of law, and he fell into error in his conception of the Act of 1875. The *weight* to be given to the evidence was as much a question for *him* to try and decide as any other, and if he had said that by reason of the *color* or *nationality* of some of the witnesses, the District Judge had dismissed the libel and *therefore* he would do the same, he would have adopted as wrong a principle of decision, as he did adopt, and this Court would be bound to review and reverse him.

He wilfully disregarded the repeated decisions of this Court in giving any legal effect to the decision of the District Judge.

The **Chas. Morgan,** 115 U. S., 75:

In the Lucille, 19 Wall, 73, 74, it was **decided*** "that an "appeal in admiralty from the District Court to the Circuit "Court has the effect to supersede and vacate the decree from "which it was taken. **A new trial, completely and "entirely new,** with other testimony and other pleadings, "if necessary, or if asked for, is contemplated, *a trial in which "the judgment of the Court below is regarded as though it had "never been rendered.*"

The **Louisville**, appendix to 154 U. S., 657.

WAITE, *J.* "An appeal in admiralty from the District Court "to the Circuit Court vacates the decree appealed from. The "case is heard *de novo* in the Circuit Court, **without any "regard to what was done below.** * * *After the "suit once gets into the Circuit Court it is proceeded with substantially in the same way as it would have been if originally "**begun** *in that Court.*"

The **Hesper,** 122 U. S., 266.

"It is well settled, however, that an appeal in admiralty from "the District Court to the Circuit Court vacates altogether the "decree of the District Court, and that the case is tried *de novo* "in the Circuit Court."

Citing:

Yeaton *vs.* U. S. 5 Cranch, 281.
Anon, 1 Gall., 22.
Roarer, 1 Blatch., 1.
Saratoga *vs.* 438 Bales, 1 Wood, 75.
Lucille, 19 Wall, 73.
Chas. Morgan, 115 U. S., 69–75.

*This is a judicial declaration of what that case decided, and *as binding as a statute*, on the Circuit Judge.

"We do not think that the fact that the claimants did not "appeal from the decree of the District Court alters the rule. "When the libellants appealed they did so in view of the rule, "and *took the risk of the result of a trial of the case* **de "novo."**

Thirty-three of the witnesses in the District Court were examined before a notary public (out of Court). They were:

For Libellant.			**For Claimant.**		
Hans Jacobson	(p. 8),	June 10, 1887.	Carl K. Johnson	(p. 24),	June 29, 1887.
Charles Versluys	(p. 8),	" " "	Otto Busch	(p. 26),	" 30, "
Anton Antonisen	(p. 8),	" " "	Niels Olsen	(p. 30),	" " "
William Walsh	(p. 8),	" " "	Henry Larsen	(p. 31),	" " "
John Bartell	(p. 9),	" " "	Rasmus Eide	(p. 31),	" " "
James Donovan	(p. 9),	" " "	Anderz Berg	(p. 32),	" " "
John McCarthy	(p. 10),	" " "	Knud Knudsen	(p. 32),	" " "
Leander Card	(p. 10),	" " "	Thos. Brodelin	(p. 32),	" " "
John Ludden	(p. 11),	" " "	Geo. Asmundsen	(p. 33),	" " "
Niels Larsen	(p. 12),	" " "	Jacob Ericksen	(p. 34),	" " "
Alex. H. Morrison	(p. 12),	" " "	Theo. Suckow	(p. 34),	" " "
John H. Hulphers	(p. 13),	Mch. 8, 1888.	Geo. F. Busch	(p. 35),	July 23, 1887.
James A. Smith	(p. 16),	" 10, "	Geo. W. Warren	(p. 38),	Mch. 10, 1888.
Nathan Wood	(p. 18),	" 15, "	Gideon Mapes	(p. 42),	" " "
			Severin Axelsen	(p. 47),	July 6, 1887.
			Carl Olsen	(p. 47),	" " "
			Hans Olsen	(p. 47),	" " "
			Henry C. Johnson	(p. 47),	Mch. 20, 1888.
			Charles Hansen	(p. 48),	" 15, "

The witnesses examined before the District Judge were:

For Libellant.	**For Claimant.**
James Leyland (p. 14).	Wm. B. Davie, Jr. (p. 48).
Eugene W. Cates (p. 15).	Saml. Wright (p. 48).
John Devlin (p. 20).	

The witnesses examined before a U. S. Commissioner on appeal to the Circuit Court were:

For Libellant.		
Eugene W. Cates	(p. 17),	Dec. 28, 1889.
Charles McDevitt	(p. 21),	Apr. 6, "
Geo. W. Warren	(p. 41),	Oct. 19, "
Gideon Mapes	(p. 46),	Nov. 30, "

Of the 38 witnesses examined in the District Court, five were examined before the District Judge, leaving 33 whom he never laid his eyes on, and of the five examined before him, only one,

Devlin, was on either vessel, and he was mate of the tug, and was libellant's witness. Of the other four, Leyland, mate of the Wyanoke, and Card, mate of the Old Dominion, were libellant's witnesses, and Davie, light house keeper, and Wright, the Corporal, both at Fort Tompkins light, and witnesses as to the dense fog *there*, were claimant's witnesses.

On libellant's appeal to the Circuit Court it further examined three, viz., Cates, Warren and Mapes, and examined one new witness, McDevitt, Capt. of the tug.

The **Lottawanna**, 21 Wall, 574, Bradley, *J.* "The gen- "eral system of *maritime law* which was familiar to the lawyers "and statesmen of the country when the Constitution was "adopted *was most certainly intended and referred to*, when it "was declared in that instrument that the *judicial power* of "the United States shall **extend** to all cases of Admiralty and "maritime jurisdiction."

> **Note.** The judicial *power* thus granted is inviolate—Congress cannot take it away—judges *must* exercise it *as given*.

"But by what criterion are we to ascertain the precise limits of the law thus *adopted?*"

> **Note.** "Adopted" is not felicitous—the maritime law was not *adopted* by the Constitution. It recognized its existence as an integral part of the law and declared the *judicial power of the U. S.* reached and embraced it, and thereby made it exclusive of the state judiciary (Moran *vs.* Sturges, 154 U. S., 256).

"The Constitution does not *define* it. * * It treats this "matter as it does the cognate ones of common law and equity, "when it speaks of 'cases in law or equity,' or 'suits at com- "mon law,' without defining those terms, assuming them to be "known and understood."

In the **Francis Wright**, 105 U. S., 384:

"Undoubtedly if Congress should give an appeal in admiralty "cases and *say no more*, **the facts as well as the law "would be subject to review and RE-TRIAL.** The "Constitution prohibits a re-trial of facts in suits at common "law (Amdt., Art. 7), but in suits in equity or *in admiralty* "Congress is left free to make such exceptions and regulations "in respect to re-trials, as on the whole may seem best."

What has CONGRESS done as to Admiralty Appeals?

By the judiciary act (1789 Ch. 20, Sec. 30, see 1 Stat., 89), "in the trial of any cause of **admiralty or maritime** "**jurisdiction** in a District Court, the decree in which may "be **appealed** from, *if* either party shall suggest to, and "satisfy the Court **that probably it will not be in** "**his power to PRODUCE the witnesses there** "**testifying BEFORE THE CIRCUIT COURT,** "should an appeal be had, and shall move that their testimony "be taken down in writing, it shall be so done by the clerk, "**and if an appeal be had** such testimony may be used "on the trial of the same **IF it shall appear**, to the "satisfaction of the Court which shall **try** the appeal, **that** "**the witnesses are dead** *or gone out of the United* "*States*, or to a greater distance than as aforesaid, from the "place where the Court is sitting, or that by reason of age, sick- "ness, bodily infirmity or imprisonment, they are unable to "travel **and appear at Court,** but **NOT OTHER-** "**WISE.**"

Act of August 23, 1842 (Chap 109, Sec. 6—see 5 Stat., 499), conferred power on the Supreme Court "to prescribe and "regulate and alter the forms of writs and other processes to be "used in the District and Circuit Courts of the United States "and the forms and modes of framing and filing libels * * * "in suits * * * in admiralty * * * and **also the forms and** "**modes of taking and obtaining evidence.**"

Under this power *Admiralty* Rule 50 was made at December "term, 1851 (13 How., p. vi.), which reads:

"When oral evidence shall be taken down by the clerk of the "District Court pursuant to the above mentioned section of the "Act of Congress **and shall be transmitted to the** "**Circuit Court**, the same may be used in evidence on the "appeal, **SAVING to each party the RIGHT to** "**take the deposition of the SAME witnesses,** "**or either of them, if he should so elect.**"

> **Nota Bene.**—Only a very perverted mind could dare to say, as to the witnesses *who were required to* **appear** before the Circuit Court, that the belief or disbelief of the District Judge in them, was a *factor* in

the trial of the appeal. And down to 1851 such was the only regular way in which evidence on appeal could be heard, the exceptions being strictly limited.

When this Court by its 49th Admiralty rule (adopted at the same time as rule 50) prohibited the *appearance of the witnesses before the Circuit Court* (thus assimilating the manner of presenting evidence in admiralty cases to the equity practice), *it did not add as a* **penalty** *for preventing the party from exhibiting them to the Circuit Judge that* **he** *should accept the opinion which the Judge of the District Court had formed as to them*, and the right to do so did not exist.

In **Blease** *vs.* **Garlington**, 92 U. S., 1, the Court held that Sec. 30, of Ch. 20 of 1789, in regard to the *oral* examination of witnesses, was not **expressly repealed** until the adopting of the U. S. R. S., which by §862 provided: "The mode of "proof in causes in equity *and of admiralty and maritime* "jurisdiction shall be according to rules **now** or hereafter "prescribed by the Supreme Court, except as herein specially "provided" (*i. e.* by commission, &c.).

The District and Circuit Courts for the Southern District of New York adopted rules to carry out Rules 49 and 50.

By rule of the District Court for the S. D. of N. Y. (adopted Nov. 17, 1868, Ben. Ad., Ed. 1870, p. 436), it is provided that "the clerk of the District Court in making up the record to be "transmitted to the Circuit Court on an appeal (in pursuance of "Rule 53, adopted by the Supreme Court at December term, "1854, as one of the rules for regulating proceedings in admiralty), *shall not include in such record, as any portion of the "testimony on the part of any party, any statement or report "of any testimony given verbatim in any court, unless such "testimony shall have been taken down in accordance with "Rules 124 and 125 of this Court*, and shall have become the "true minutes of such testimony in accordance with Rules 124, "125, 126 and 127 of this Court; and no consent of parties "shall be of any avail to dispense with or vary so much of said "Rules 124 and 125 as requires such *verbatim* testimony given "in open court, to be taken down in the same manner as in jury "trials in common law issues, and not *verbatim*, as in depositions *de bene esse*."

Rule 124 (Ben. Ad., Ed. 1870, p. 419) provided, "when either "party shall require *viva voce* testimony given in open court,

" to be taken down by the clerk *pursuant to the act of Congress*, " it shall be taken in the same manner as in jury trials on " common law issues, and not *verbatim*, as in depositions *de* " *bene esse*."

Rule 125 provides: "The notes of the Judge may, by assent " of parties, be used as if taken down by the clerk."

Rule 126 provides: "Each party desiring to diminish, vary " or enlarge the minutes of proofs taken by the clerk or Judge, " may within two days after the trial, serve a statement of " proofs on the proctor of the opposite party, and such state- " ment, if assented to, or, if no amendments are proposed " thereto, within two days thereafter, by such proctor, shall be " regarded the true minutes of the testimony given, and the " notes of the Judge or clerk be corrected in conformity " thereto."

Rule 127 provides: "If amendments are proposed and the " parties do not agree therein, the statements and amendments " shall be forthwith referred to the Judge, and he shall settle or " determine how the facts are, and the statement thus settled " or adjusted shall be filed as the true minutes of the testimony " given."

The Circuit Court Rule of November 17, 1868 (Ben. Ad., Ed. 1870, p. 398), provides: "On the hearing, in this Court, of an " appeal from the District Court, on any record which shall " hereafter be transmitted from the District Court, no state- " ment or report found in such record, of any testimony given " *viva voce*, in open court, in the District Court, will be consid- " ered by this Court as evidence, unless such testimony shall " appear, on its face, to have been taken down in the same " manner as in jury trials in common law issues, and not " *verbatim*, as in depositions *de bene esse*."

Circuit Court Rule 121 (Ben. Ad., Ed. 1870, p. 394), provides: " If, in the appeal, **it shall not** be intended to make new " allegations, to pray different relief, *nor to seek a new decision* " *of the facts*, then the pleadings, evidence, and decree, in the " District Court" * * * shall be certified to this Court " with the appeal. *But, in all cases*, the statement agreed " between the parties, or settled by the Judge of the District

"Court, and on file, according to the practice of that court, "may be certified in the place of the evidence at large."

Rule 122: "If it shall be intended to seek **only a new "decision of the facts,** then the pleadings of the parties "with the stipulations in the cause, and the clerk's account of "the funds in Court, if any, *and the exhibits and depositions* "in the cause, shall be certified to this Court with the appeal, "**but the proofs need not be certified** unless "specially required *by the appellant* or ordered by this Court."

Rule 132: "After the libel and answer, whether **newly "filed** in this Court, or certified from the District Court, shall "be filed in this Court, the cause shall be proceeded in to a "hearing, *as in other cases.* But, where interrogatories have "been answered in the District Court, or written testimony "taken, the same **may** be used in this Court."

Circuit Judges exercise an extended jurisdiction; equity, common law, admiralty law, bankruptcy and criminal law are each in turn dealt out by the *same* judge, and unless he possesses a well *balanced* mind, the rules of one get mixed with the rules of the other, *and any leaning of the common-law lawyer*, in favor of that system, as opposed to the *civil-law* system, has a chance to develop.

The **Sarah,** 8 Wheaton, 391, Marshall, *C. J.*: "By the Act "constituting the judicial *system* of the United States the "District Courts are courts both of common law and admiralty "* * * *Although the two jurisdictions are vested in the "same tribunal, they are as different from each other as if "they vested in different tribunals*, and can no more be blended "than a Court of Chancery with a Court of Common Law."

The **Adeline,** 9 Cranch, 284, Story, *J.*: "No proceedings can "be more unlike than those in the Courts of Common Law and "in the Admiralty."

How the Fungus Grew.

The soil where it was planted was the Southern District of New York.

The first cultivator (according to Wallace, *J.*, 25 F. R., 775), was Judge Nelson, and the first product (according to the same authority) was named the Sampson (4 Blatch., 28, 1857) (but

see the *Grafton*, 1 Blatch., 173), followed by the "*Florida*" (4 Blatch., 471, 1860), and a hybrid from it called the *Sunswich* (5 Blatch., 280, 1868), and the stock was increased by the production of the *Heroine* (6 Blatch., 188, 1868), where that learned (but common-law) lawyer said "In such cases however, the question "must mainly be one of fact, and as *several* of the material wit- "nesses were examined orally before the learned Judge, his op- "portunity for determining the degree of credit to which their "testimony is entitled was of course much better than mine is."

Circuit Judges Woodruff, Johnson and Blatchford did not take to the new product, and it lay uncultivated until Judge Wallace resurrected it in the *Rockaway*, 25 F. R., 775. And Judge Lacombe (lately from the office of New York Corporation Counsel, with no admiralty experience), also entered on the culture in *Morse* v. *L. W. Coal Co.*, 36 F. R., 832, which he continued in

The *Wm. H. Vanderbilt*, 37 F. R., 116.
The *Thos. Melville*, 37 F. R., 271.
The *Sammie*, 37 F. R., 908.
The *Excelsior*, 40 F. R., 271.

Judge Wallace again accepted the spawn as genuine, in the *Saratoga*, 40 F. R., 509, and the *Express*, 52 F. R., 892.

Judge Lacombe in the *Wm. H. Vanderbilt*, speaks of "the "value of the *personal equation* with which all human testi- "mony is to be tested."

And in the *Thomas Melville*, he speaks of the "proper appre- "ciation of the appearance of the witness on the stand" as a test from which "the *reviewing* judge is debarred," and states, as a principle and guide in the **trial** of an admiralty appeal, the same rule as complained of now, as follows: "The *effect* how- "ever which such appearance and manner **produced on an "associate judge** is a **fact** in the case, **spread before "him on the record,*** and eminently proper to be con- "sidered by him in reaching his conclusion."

NOTE.—The District Judge is not an "Associate Judge," nor is the Circuit Judge "*reviewing*"; he is re-trying. No exception or ruling of the District

* The Elizabeth Jones, 112 U. S., 519: "The opinion of the Court, although, as required by a rule of this Court, annexed to and **transmitted with the record, is no part of it.**"

Judge is before the Circuit Court. If the *D. J.* rejected evidence improperly, the rejection is no ground for reversal, and the appellant's only remedy is to take the rejected evidence of the witness in the Circuit Court.

Such methods of dispensing with the trouble of careful consideration and study of testimony, substituting the prejudices of some other mind for a painstaking analysis and search for the truth are labor-saving; but unlawful.

The **"Ariadne,"** 1871, 13 Wall, 475.

Swayne, *J.* (479): "We are not unmindful that both the Cir-"cuit and District Courts came to a conclusion different from "ours as to the alleged fault of the steamer."

"Their judgments are entitled to, and have received our *most* "*respectful consideration.* Their concurrence raises a presump-"tion *prima facie*, that they are correct. Mere doubts should "not be permitted to disturb them. But the presumption re-"ferred to may be rebutted. *The right of appeal to this Court* "*is a substantial right, and not a shadow. It involves examin-*"*ation, thought and judgment.* Where our convictions are "clear, and differ from those of the learned judges below, we "may not abdicate the performance of the duty which the law "imposes upon us by declining to give our own judicial "effect."

Note. In the Nacoochee 137, U. S. 338, both lower courts were reversed.

Another Illustration of what a NEW TRIAL Means.

By the New York Revised Statutes (Part 2, p. 309, § 37; Vol. 3, 6th ed., p. 576), incorporated into § 1525 of the Code of Civil Procedure provision is made for a second and third *new trial* in an action for the recovery of real property (*i. e.* ejectment). The provision is as follows:

"The Court in which such judgment shall be rendered, at any "time within three years thereafter, upon the application of the "party against whom the same was rendered, his heirs or "assigns, and upon payment of all costs and damages recovered "thereby, *shall vacate such judgment and grant a new trial in* "*such cause.* And the Court upon subsequent application made

"within two years after the rendering of the second judgment "in said cause, if satisfied that justice will be thereby promoted, "and the rights of the parties more satisfactorily ascertained "and established, *may* vacate the judgment and grant another "new trial. But no more than two new trials shall be granted "under this section."

Imagine this case :—A case of ejectment tried—the witnesses orally examined—the verdict for the plaintiff. The defendant, after the lapse of one, two or within three years, pays his costs and damages and the judgment is vacated and a *new trial* ordered. Some of the witnesses on one side or the other have, in the interim, died and their testimony taken on the first trial becomes competent on the second trial (Code § 830). Would it be sound law for the Court, on the second or third trial, to receive evidence of what the verdict on the first trial was and then instruct the jury on the second or third trial that, inasmuch as the jury on the *first* trial have had the opportunity to observe the manner in which the witnesses have testified, inasmuch as that jury rendered a verdict for the plaintiff, that the verdict rendered in that way by the first jury "*is a fact eminently* "*proper to be considered*" by them in reaching their conclusion, or that the "*personal equation*" must be considered in the *problem* to be solved ?

Still Another Illustration.

In the State of New York, on an appeal from a justice's judgment, a **new trial** is a matter of right (Code of Civil Procedure, §3068).

There is sound law in the following case :

Burns *vs.* **Howard,** 9 Abb., N. C., 323; Rumsey, *J.*: "The appeal *for a new trial* to the County Court has an effect "different from the writ of error. The writ of error presents to "the Appellate Court only the question whether the judgment "appealed from shall be affirmed, or reversed, or modified. "Whatever the upper Court may do, the judgment below re- "mains until the decision of the Appellate Court has been "made and its judgment entered, and if that judgment is an "affirmance, a new judgment is entered, and the judgment of "affirmance is *separate and distinct* from the judgment ap- "pealed from. * *

"**But upon an appeal for a new trial the case "is heard** *de novo*. From the time the appeal is perfected, the "action is deemed to be pending in the County Court; and all "proceedings in the suit, including the entry, enforcement and "review of the judgment, are the same as if the action had been "originally commenced in that Court (Civil Code Pro., §3071). "The new trial is a matter of right. The undertaking given is to "pay the judgment of the Appellate Court. No execution can be "issued on the judgment appealed from. And the County Judge, "upon final decision, renders a new judgment in accordance with "the verdict or report, *and without regard to the judgment "below*, upon which execution is issued. From the time the "appeal is perfected the justice's judgment is practically "*functus officio*. **The issues joined between the "parties are remitted to another tribunal, "there to be retried upon new evidence**, *with no "presumption in favor of the first judgment*, and, indeed, "without any reference to it. The whole matter is thus at large "*as though no trial or judgment had been had*, or more "properly *as though a new trial had been ordered*."

Sharon *vs.* **Hill**, 26 F. R., 345; Deady, *J.*: "But in the equity and admiralty courts, the remedy for an erroneous decree is an appeal, which removes the whole case into the court above for trial *de novo*. *There is no decree left in the lower court, and pending the* hearing on appeal there is no decree in the case, and there can be no estoppel by reason thereof.

Comments on Judge Brown's Opinion (p. 60).

Judge Brown recognized the conclusiveness of the comparison between time elapsed and distance run, in determining speed, and went into an exhaustive calculation in which he takes the time of the Holberg's leaving Pier 15, E. R., as 3.15 P. M.; the time of the collision as 4.25 P. M.; the place of the collision *very near* buoy 11 (p. 63), and says: "We find a little over 9½ "nautical miles to the place of the collision run in an hour and "ten minutes" (p. 63).

This would be an average of a trifle over 7⅓ knots an hour, but was obviously no test, inasmuch as the Holberg ran *slow* (*i. e.*, 3 to 3½ knots an hour) from Pier 15 to abreast of Bedloe's Island,

and arrived there (as Judge Brown found) at 3.25 P.M. Judge Lacombe gets her there between 3.27 and 3.32 (6th Fdg., p. 51). In fact she could not get there, as I have demonstrated (see pp. 43 and 44 of this brief), before 3.35 P. M. While Judge Brown does not mention this period of "slow" *where it took 17 minutes to run a mile*, and of which Judge Lacombe only says "*She ran* "**slow** *out of the East River*, but *soon* increased to full speed (6th Fdg., p. 51), *it is obvious that every mile of slow* reduced the time left to run the rest of the 9½ miles, and necessitated an increase of speed to get there.

Judge Brown fixes abreast of Bedloe's Island "where the Holberg was under full speed" as a new "departure," and 3.25 as a new time, and 8½ knots as the new distance to buoy No. 11, the place of collision. From these data he figures out "had the Holberg *not slowed at all* she would have been at "4.25 P. M. half a mile below the place of collision" (p. 63).

All this is admirable and decisive but for the *contingency;* if the witnesses on the Holberg were to be believed, they did slow, and slowed to dead slow, and to prove that she could run 8½ miles in an hour or even 9 miles (and even Judge Brown couldn't give her any more than an hour), went a very little way to prove she ran slow and dead slow any part of that hour.

Thereupon Judge Brown bethought himself of the tides and the ebb current in the North River and the tide tables *not one of which had been testified to or put in evidence.*

And he entirely ignored or forgot the **evidence** which was before him of Capt. Hulphers (p. 14), who testified "we had the "*last* of the ebb tide with us. The tide gradually *diminished* "as we got down towards the Narrows." As well as the allegation of the libel (Art. 5; tide about half *flood*, p. 2) and admission of the answer (Art. 8; "bark came on at full speed with the *flood* tide" (p. 5).

In Appendix No. **2** (p. 91) I print an extract from the Govt. Tide Tables for 1887, and a communication from the U. S. Coast and Geodetic Survey Office, dated March 16, 1889, in which the data, on which the Government Tide Tables, referred to by Judge Brown, are based, are stated to be "*not very accurate*," and on which a new prediction is given based on "slightly better" data.

What Court would discard the unimpeached evidence of a

personal observer as Capt. Hulphers, of the Wyanoke, was, for *predictions* based on such inaccurate data?

But Judge Brown, in order to give the Holberg more speed *over the ground* and thereby increase her time allowance, says: "*So that the Holberg had the benefit of the outward current* "**all the way** *at the average rate of about a knot an hour.*" (p. 63).

Note. Judge Lacombe found, "the Holberg carried the ebb "tide with her from Bedloe's Island to *a little below the forts.* "After a brief period of slack water and until the collision "there was a *flood* tide" (6th Fdg., p. 51). See Warren, p. 41.

But the most extraordinary *omission* of Judge Brown consists in his **utterly ignoring** the evidence of the crew of the Holberg, who all concur in saying that at **4 o'clock** the Holberg was *north* of Quarantine station. (See this evidence grouped on pp. 36 to 38 of this brief), and the confirmatory evidence of Capt. Hulphers of the S.S. Wyanoke, who passed the Holberg inside the Narrows. This was a new point of departure from which the time and distance were fixed.

It was here, as all the witnesses for the Holberg concur in saying, she ran into thick fog—it was *here* her **log** (p. 28) *falsely* states "the steamer **instantly was given half speed**" and her lying witnesses said the same.

But from Quarantine to the wreck buoy is 3½ knots (or 21,280 ft.) **in a straight line**, and nearly 28,000 feet on the channel course, and the Holberg had 26 minutes to pass over it; so it became necessary to lengthen her time *somehow or other*, and the Circuit Judge found it was "*nearly 4 o'clock* when she reached Ft. Lafayette" (6th Fdg.) and that from there to the place of collision is 3⅛ knots (*id. ibed.*), *i. e.*, 19,000 ft. to make in 26 minutes, *plus*.

Judge Brown while saying (62) that the evidence of the Holberg's witnesses "*is in no way impeached*," rejected all they and her log say about her being put at half speed *inside the Narrows*, where she was in such dense fog that the forts could not be seen as they were passed; and mercifully (for the Holberg) *changes* the testimony of Pilot Mapes (who first said she was put at half speed *abreast* of Craven's Shoal [p. 42]) to *below* Craven's Shoal.

From Ft. Lafayette to Craven's Shoal is 6,840 ft., and Judge Brown is willing to convict the Holberg of the *innocuous* **crime** of running full speed through the Narrows and for over a mile beyond in the dense fog; but this does not discredit her witnesses who have sworn the exact contrary ! !

From Craven's Shoal to buoy No. 11 is 11,780 ft.

Of this distance, Judge Brown gives the Holberg 10 minutes at 700 ft. a minute = 7,000 ft. and 5 minutes at 350 ft. a minute = 1,750 ft., a total of 8,750 ft.; the other 3,000 ft. are unaccounted for except by the *beautifully indefinite* "below" Craven's Shoal and the tide of 100 ft. a minute "all the way"—*which did not exist.*

In his note to tides (p. 65) Judge Brown says: "The *slack* before flood and ebb lasts about **twenty** minutes."

The Holberg had 21 minutes to go from Ft. Lafayette to the collision and Judge Lacombe found *slack* water below the forts (6th Fdg., p. 51).

Judge Brown says (p. 63): "There is no question that the "steam tug gave one or two single blasts of the whistle and "afterwards a *signal* of two blasts."

"The first blasts were understood by the "steamer as fog signals."

Pilot **Mapes**, of the Holberg, testified, p. 45: "Q. What was "the first you heard of the tugboat. A. That whistle was the "first I heard of it. Q. *Then you heard no fog whistles blown "on the tugboat.* A. *No; I didn't hear any blown on her.*" "* * Q. When you heard the whistle did you take it to be a "*signal* from the tugboat, or did you take it to be a *fog whistle?* "A. I took it to be a **signal** from the tug."

Capt. **Busch**, of the Holberg, said (p. 38): "When I heard "the tug's whistles the first time *I thought it was a fog signal* "they were blowing, of course."

Here we have testimony *both* ways from the "*consistent*" witnesses of the Holberg, and although the pilot was in charge and *his* mind and *understanding* directed the Holberg's movements, it is the Captain's understanding which is followed by the District Judge.

Lastly.—The decree of the Circuit Court should be reversed and a decree ordered in favor of libellant with instructions to the Circuit Court to ascertain the amount of its damages, with interest thereon from the date of the collision and with costs in all the courts.

Dated October 11, 1894.

Respectfully submitted,

GEO. A. BLACK,

Of Counsel for Sugar Co.,

44 Pine St., New York.

Appendix No. 1.

UNITED STATES CIRCUIT COURT,

DISTRICT OF NEW JERSEY.

PETER KIERNAN, and others, owners of the Steamtug "Leonard Richards,"
Libellants & Appellants,

vs.

JAMES E. STAFFORD, owner of the Bark "Quickstep," The F. O. Matthiessen & Weichers' Sugar Refining Company, and others,
Respondents.

On Libel and Petition for Limited Liability, &c.
Opinion on Appeal.
43 F. R., 542.

BRADLEY, *C. J.* After carefully reading the evidence in this case, I am unable to agree with the Judge of the District Court as to the tug Leonard Richards being in fault in regard to the collision between the steamer Ludvig Holberg, and the bark Quickstep.

The only direct evidence in the case as to the position and movements of the three vessels at the time of, and preceding the collision, was given by McDevitt and Devlin, the master and mate of the tug, by Woods, the pilot in charge of the bark and tug, and by the officers and crew of the Quickstep. *And from this evidence, taken together, it seems to me that the Holberg was solely to blame.* Had the people in charge of the Holberg been brought in to testify, the case might have had a different look; but they were not; and the omission to produce them rather raises a presumption against the respondents.

The account given by the captain and mate of the tug is substantially confirmed by the pilot, and the testimony of the officers and crew of the Quickstep, does not materially affect it.

That account is, that the tug, with the Quickstep in tow by a hawser of 80 fathoms in length, about half-past four o'clock in the afternoon of the 24th of May, 1887, had just issued from the

Swash Channel, on their way to New York, and had entered the main channel, and were heading north by east on the course of that channel, when they discovered the Holberg, coming down the channel, about half a mile distant, nearly ahead, but *slightly on their port bow;* she, the Holberg, heading a little more southeasterly than the reverse course of the tug and bark *so as to show her starboad bow and side.*

Thereupon, the tug, *as was proper to do*, blew two blasts of the whistle to signify that she proposed to pass to the left, that is, on the starboard side of the Holberg. But the latter did not accept this offer, and replied with a single blast, signifying to port helm, and pass each other to the right or each on the port side of the other. The tug at once accepted this signal, and replied by a single blast to that effect, and immediately ported her helm accordingly; and the Quickstep did the same, but the Holberg, after porting her helm sufficiently to bring her head on to the tug and bark, steadied her helm so as to run directly towards them. Seeing this, the captain of the tug repeated the single blast to call the attention of the Holberg to the manœuvre agreed on. But, then the Holberg, *when so near as to render a collision almost inevitable*, blew two blasts, and the tug to escape being run down, turned quickly to the left, and just escaped by a distance of ten or a dozen feet. The bark was absolutely unable to get out of the way. The Holberg kept on her course, running between the tug and the bark, cut the towing hawser in two, and struck the bark on her port quarter, abaft the mizzen topmast backstay, cutting into her several feet, which caused her to sink and produced the loss in controversy.

It is clear from this evidence, that the disaster was caused by the Holberg not complying with the signals agreed on, and changing the signals at an inopportune moment, and that no fault can be attached to the tug. *Undoubtedly the vessels were far enough apart when first seen by each other to have avoided all danger of collision. The channel was wide enough to have enabled either of them to bear away at a safe distance. The tug, by sheering off greatly out of her course, could have kept away from the Holberg, if the latter contumaciously refused to give way. But the ordinary rules of navigation do not require any such anomalous course.* It may be presumed that each vessel will observe the rules laid down for passing each other and which are abundantly sufficient to obviate collisions, with-

out requiring them to make wide and useless circuits. *The after wisdom which points out what might have been done, but which the ordinary rules of human conduct do not expect to be done, is no criterion for judging of culpability.*

Considerable evidence was taken by the respondents. The F. O. Matthiessen & Weichers' Sugar Refining Co., after the other evidence was closed, to show that there was a thick fog at the place of collision at the time it occured, and that this fact materially affected the duties of the parties, by enhancing the care and caution required of them in speed, and in making and distinguishing the signals made by the steamer whistles, a degree of care and caution which the colliding parties on both sides failed to exercise. But all the witnesses who were present and witnessed the disaster, agree that, whilst the weather was somewhat thick and hazy, there was not sufficient fog to prevent a clear view of vessels and objects a mile or two away, and that the Holberg was distinctly seen and noted from the tug and bark when she was half a mile off. *Drifts of fog were coming in from sea about that time, and some vessels were enveloped* IN FOG BANKS OCCASIONALLY *which made it necessary for them to slow up,* and make fog signals. *But at the place where the collision occurred, and when it occurred there was no material obstruction to the view.* This is testified to not only by the master and mate of the tug, but by the dozen witnesses who were on the bark, and were produced by the owner, the respondent Stafford.

I am of opinion that the tug Leonard Richards, was not in fault and that a decree to that effect should be made in favor of her and her owners against the respondents, discharging them from all liability for loss occasioned by the collision in question.

September 26th, 1890.

JOSEPH P. BRADLEY,
Circuit Justice.

Appendix No. 2.

Extract from Tide Tables for the Atlantic Coast of the United States for the year 1887. Prepared and published by the U. S. Coast and Geodetic survey.

1887, May 24.

New York.	Sandy Hook.
Low Water, 2:32 p. m.	Low Water, 2:32 p. m.

Note.—*The table makes it low water at the same minute on the coast and 20 miles inland! !* The true difference is 43 minutes.

U. S. Coast and Geodetic Survey Office.

Washington, March 16, 1889.

George A. Black, Esq.,
Counsellor at Law, &c.,
No. 71 Wall Street,
New York, N. Y.

Dear Sir: Your letter of 26th ult. was received in due course of mail, but upon looking up the case to which you refer (36 Fed. Rep., 914) the magnitude of the interests involved induced us to give to the subject a more than usual share of attention, and hence the delay in responding.

The predictions for Governor's Island, N. Y., contained in our Tide Tables for the Atlantic Coast for the year 1887, pages 89 to 91, inclusive, prepared and published in 1886, are *not very accurate*, owing to defects in the data upon which they were based. We have now re-predicted for that station for May 24, 1887, using the better data contained in Appendix No. 13, U. S. C. & G. Survey Report for 1885, published in 1887 (a copy of which is sent you herewith). We have also re-predicted for Sandy Hook for the same day, using data *slightly better* than the data upon which the published table for 1887 was based. For the times and heights of high and low water at Governor's Island, N. Y., and Sandy Hook, N. J., on May 24, 1887, as given in the "Tide Tables for the Atlantic Coast of the United States for the year 1887, prepared and published by the U. S. Coast and Geodetic Survey, Washington, 1886," pages 84 and 96 respectively, we substitute the times and heights in the table following:

TIDE TABLE FOR MAY 24, 1887.

Station.	High Water.				Low Water.			
	A. M.		P. M.		A. M.		P. M.	
	Local Time.	Height.	Local Time.	Height.	Local Time.	Height.	Local Time.	Height.
	h. m.	feet.	h. m.	feet.	h. m.	feet.	h. m.	feet.
Governor's Island, N. Y.	8 55	4.3	9 03	5.0	3 05	-0.4	**2 55**	-0.2
Sandy Hook, N. J.	8 38	4.6	8 42	5.3	2 34	-0.4	**2 55**	-0.1

The existence of fog on May 24, 1887, indicates the absence of winds of sufficient force to accelerate or retard the tides.

The time by which high and low water arrive at Governor's Island later than at Sandy Hook on May 24, 1887, is less than the average, which is 32m. for high, and 43m. for low water (a wave motion advances more slowly the shallower the water).

Yours respectfully,

B. A. COLEMAN,

Assistant U. S. C. & G. Survey,

In Chg. Office & Topog'y.

157-60

Office Supreme Court, U. S.
FILED
DEC 7 1894
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1894

No. 136

THE F. O. MATTHIESSEN AND WIECHERS SUGAR REFINING COMPANY

Libellant and Appellant

vs.

THE STEAMSHIP LUDVIG HOLBERG, CHRISTOPHER KAHRS, ET AL

Claimants and Appellees

BRIEF FOR THE APPELLEES

HARRINGTON PUTNAM
Counsel

LIVINGSTON MIDDLEDITCH CO., 149-155 LEONARD ST., N. Y.

SUPREME COURT OF THE UNITED STATES.

The F. O. Matthiessen & Wiechers Sugar Refining Company, Libellant and Appellant,	
against	No. 136.
The Steamship "Ludvig Holberg," Christopher Kahrs and others, Claimants and Appellees.	

Brief for the Appellees.

This is an appeal from an admiralty decree of the Circuit Court of the United States for the Southern District of New York, dismissing the libel in affirmance of a decree of the District Court. The action arose from a collision between the small steamship *Ludvig Holberg* and the bark *Quickstep*, which at the time was being towed on a hawser by the tug *Leonard Richards*.

Statement of the Proceedings.

The collision occured in the outer bay of New York, some three miles below the Narrows, about 4.26 P. M., on May 24th, 1887. The owners of the bark *Quickstep* immediately filed a libel against the steamship *Holberg* and the tug *Leonard Richards*. The Sugar Refining Company also proceeded against the same vessels to recover the loss to the cargo of the bark. The tugboat, however, was not seized in these suits, as the owners thereof took proceedings for limitation of liability in the District of New Jersey.

The actions in New York went to final hearing against the steamship *Ludvig Holberg* alone, and involved taking the testimony of 38

witnesses. The questions of fact were whether the weather was foggy so as to require sound signals, and whether the navigation and signals of the three vessels were according to law.

The movements of the colliding vessels appear from the diagram inserted upon the opposite page.

The *Ludvig Holberg*, heading S. ½ W., with about three and a half knots speed, saw the tug *Leonard Richards* bearing a little on the starboard bow, and at a distance on the diagram of 265 feet.* The course of the tug at the time was inclining to the westward, and she blew two whistles, which were assented to by two whistles of the *Ludvig Holberg*, which also starboarded her helm in compliance with these signals. The *Ludvig Holberg*, when passing all clear of the tug, suddenly made the bark ahead and on the *port* bow about 300 feet off—the divergent headings of the two vessels enclosing the *Holberg* beyond chance of escape. She immediately put her helm a-port, stopped and backed her engines and hailed those on the tug to cast off the towing hawser. However, the steamer's starboard bow struck and parted the hawser, the taut line canting the steamer's stem more toward the bark, and the collision followed at an angle as shown in the diagram, the steamer's stem striking the bark's port quarter. The steamer was almost stopped at the time of the blow. The tug had been opened full speed under a hard-a-starboard helm, and the bark had put her helm hard-a-port, the pilot also ordering the hawser to be cast off. There was no one on the bark to let go the hawser, and starboard helm was ordered, but it was too late materially to change the bark's heading.

All this occurred in fog.

The *Ludvig Holberg* had no notification of the invisible tow astern. The diagram shows that the only possible chance of clearing the bark, after she was seen, was to attempt to pass between the two vessels, which was entirely dependent on quick cutting or casting off the towing hawser.

It was found by the learned District Judge (Honorable Addison

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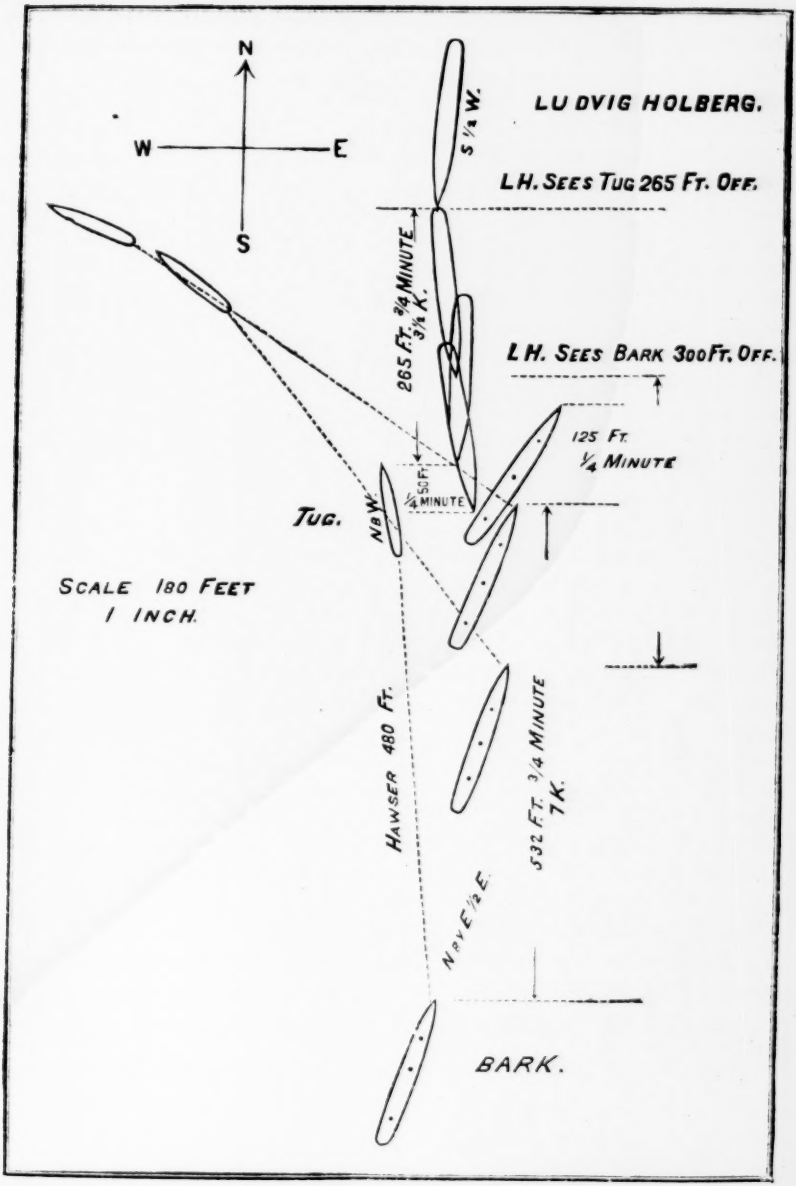
* The witnesses from the *Holberg* estimated that the tug was made between 200 and 300 feet off. Before sighting the tug's stem, her smoke stack and pilot house probably would be first seen. On the diagram, therefore, 265 feet is taken as the distance between the *bows* of the two vessels at the moment when the tug came in view.


N
W
E
S
LUDVIG HOLBERG.
S ¼ W.
L.H. SEES TUG 265 FT. OFF.
265 FT. ¾ MINUTE
3½ K.
L.H. SEES BARK 300 FT. OFF.
125 FT.
¼ MINUTE
SCF.
¼ MINUTE
TUG.
N.B.W.
SCALE 180 FEET
1 INCH.
HAWSER 480 FT.
532 FT. ¾ MINUTE
7 K.
N.B.Y.E.½ E.
BARK.

Brown) that for at least fifteen minutes before the collision there was so much fog as to require sound signals; that the *Ludvig Holberg* was sounding fog whistles and going dead slow, not over 3½ knots; that the tug made no signal to indicate a tow 400 or 500 feet astern; that on receiving two whistles from the tug, the steamer rightly starboarded, and passed the tug starboard to starboard; that the bark when seen was not following after the tug, but was to starboard of her, and by putting her wheel hard-a-port threw her head more to starboard, seeing which, the steamer ported in order to go between the tug and the bark, at the same hailing the tug to cast off the hawser, but that it was not cast off, and the *Holberg* struck it with her starboard bow, swinging the steamer's bow toward the *Quickstep*, resulting in a collision at the bark's port quarter; that the steamer reversed as soon as danger from the bark was apparent, and was nearly stopped at the collision; that the tug and bark did not stop, and that the force of the blow arose mainly from the forward motion of the bark. (Record, p. 61.)

These findings of fact necessarily resulted in a dismissal of the libels, with costs. (Decree District Court, p. 7.)

Both libellants appealed to the Circuit Court, taking some additional proofs. The cause was most elaborately argued, not really on the issue of fog, which was established by overwhelming evidence, but rather to make out contributory fault against the *Ludvig Holberg*, notwithstanding the gross neglect of those in charge of the tug and the bark. Five entire days were devoted to the hearing of the causes on this appeal. The printed record of testimony and briefs exceeded 485 pages. The learned Circuit Judge affirmed the District Court, finding substantially all the contested issues of fact against both libellants. His findings appear at pp. 50, 51 and 52, and his opinion at page 66 of the record. A decree having been entered in favor of the claimant, for $404.63 costs of both courts (p. 59), the libellant duly paid and satisfied the decree, the satisfaction piece being filed on August 12th, 1890. (p. 68.)

Thereafter, and on October 8th, 1890, the libellant above-named entered an appeal to this court. (p. 69.)

The owners of the bark *Quickstep* took no appeal, but also paid and satisfied the decree against them.

The libellant under the form of a bill of exceptions has sought to try

the issues anew upon the facts, and has raised on the record thirty-eight exceptions to the findings and conclusions, as well as the refusals to find by the Circuit Court.

The appellees and claimants of the *Ludvig Holberg* were not parties to, and their witnesses were not called in, the suit in New Jersey between the bark and the tug *Leonard Richards*. The learned Circuit Justice (the late Mr. Justice Bradley), at the outset of his decision, points out how weak the evidence before him was against the tug, saying:

"Had the people in charge of the *Holberg* been brought in to testify, the case might have had a different look; but they were not, and the omission to produce them rather raises a presumption against the respondents." (43 Fed. Rep., 542.)

The conclusions from the absence of evidence can hardly be considered as affecting the soundness of the results reached in two other courts after hearing the testimony of those very witnesses whose absence from the record in New Jersey amounted to a fatal defect of proof in the action against the tug.

Both the courts below having found the existence of fog before the collision, and having also found that the *Ludvig Holberg*, for several minutes before sighting the tug, was going dead slow and giving proper signals, the attempt is made to reopen this question of fact upon this appeal to this court.

POINTS.

First.—It is now settled in admiralty appeals to this court since the Act of 1875, that questions of fact are not reviewable here. The jurisdiction of this court, like that of the French Court of Cassation, is not exercised to retry issues of fact which stand on the findings of the court below.

The *Abbotsford*, 98 U. S., 440.
The *Francis Wright*, 105 U. S., 384.
The *City of New York*, 147 U. S., 72, 76.

"The act of Feby. 16, 1875, c. 77 (18 Stat., pt. 3. p. 315), which took effect on the first day of the following May, *relieved us from the labor of weighing evidence*," *per Waite* C. J., in the *Richmond*, 103 U. S., 540, 543.

It has always been the law of France that the highest court will not review the facts, nor even the conclusions as to whether certain navigation was prudent, or whether the facts found amount to major force. These questions all "*appartient au juge du fait d'apprécier souverainement.*"

See Dalloz, Jurisprudence générale, 1889, 1,231.
" " " 1876, 1,477.

The specific fact found by the courts below is that the *Ludvig Holberg*, before approaching the bark and tow, was proceeding at a speed slowed down to about 4 knots over the ground and not over 3½ knots through the water. The learned District Judge found that she had been running "slow" for about five minutes before the collision (p. 63), and the Circuit Judge found that she had been slowed still longer, during which she went a distance of 4500 feet (9th finding, p. 52).

This was based on abundant evidence. Not only was it the testimony of the officers and engineers of the steamship herself, but it was confirmed by the master of the Sandy Hook steamer *St. Johns*, which overtook and passed the *Ludvig Holberg*, although the *St. Johns* at the time was running not to exceed five knots (Warren, p. 39).

The repeated statements of this Court of the finality of facts thus

found, with evidence to support them, are certainly applicable to the appellant's attempt to retry a question of speed in fog, after it has been vainly sought in two courts to overturn positive evidence of eye witnesses, by figuring from imaginary data, entirely without support in the evidence.

Second.—The appellant's counsel no longer attempts to defend the navigation of the bark or the tug. Their combined faults afford a full explanation of this collision.

The following are some of the faults of the tug and bark :

The tug and bark are in fault for towing with so long a hawser in the fog.

It is found, without exception, that this hawser was 80 fathoms long (p. 50). It is nowhere pretended that this was ever shortened on coming in from sea before the collision.

In the case of the *Hydaspes and Centurion*, this point was considered by the English Board of Trade, and although the fog was sudden and the vessels were towing in the open way of the English Channel, it was held that the length of 75 fathoms was improper, and that the vessel should have reduced the towing hawser to 20 fathoms.

The whole case is printed in the appendix to this brief, not being in the regular law reports.

The same point has been decided in New York.

The *City of Alexandria*, 31 Fed. Rep., 427.

The tug directly brought about the collision by failing to sound the proper fog signals of three blasts to indicate the presence of the tow—a tow astern upon a hawser nearly 500 feet in length.

The Inspector's rule is as follows :

All steam vessels (except upon the Red River of the North and rivers whose waters flow into the Gulf of Mexico), when engaged in towing, during fog or thick weather, shall sound three distinct blasts of their steam whistles in quick succession, repeating at intervals not exceeding one minute (p. 49).

This is mandatory. Three blasts must be blown, not only in *fog*, but in *thick* weather.

It was observed by other tugs at that same time and place.

Captain Axelsen, master of the bark *Aristos*, was towed up close astern of the *Quickstep*; the tug towing his vessel blew three blasts of her whistle often (p. 47).

This omission directly brought about the collision.

Mapes, the pilot in charge of the *Ludvig Holberg*, testified:

If I had heard three whistles when I first saw the tug, I should have understood that she had something in tow, that has long been the towing fog signal (p. 43).

Obviously, to tow with such excessively long hawser in a fog, and omit the signals required for a tow, is a grave fault.

The *City of Alexandria*, 31 F. R., 427.

Judge Brown concludes his opinion with this summary:

"The true immediate cause of the collision, in my judgment, *was the failure to sound the proper fog whistles to indicate the presence of a tow*, or to cast off the hawser." (p. 64).

The bark was also in fault for not sounding some fog signal.

1st. The pilot was in control. He should have required the tug to conform to the law. His neglect puts the *Quickstep* in fault.

The *Civilta* and the *Restless*, 103 U. S., 699.

2d. In view of the length of hawser the bark should have stationed a man on the forecastle head to sound a horn.

The *Peshtigo*, 25 Fed. Rep., 488.
The *City of Alexandria*, 31 Fed. Rep., 427.

Even if the bark and tug were not constantly enveloped in the fog before the collision, they were still bound to give fog signals to warn vessels approaching from within a fog bank ahead.

The captain of the tug testified it was

"A light fog getting thicker all the while. It looked thick and fog banks ahead looking up ahead as we came up towards the Narrows" (p. 23).

It has been held that the rule requiring sound signals applies not only when both vessels are actually enveloped in the fog, but also when one is so near to the denser fog that it is necessary that her position should be known to any vessel that may happen to be within it.

The *Perkiomen*, 27 F. R., 573 (1886).

The tug and the pilot in charge of the bark were in fault in not keeping on the starboard side of the channel.

Article 21 of the International Regulations is:

"In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of the ship."

"Where a vessel is required by law or usage to keep on one side or the other, if she is on her wrong side, she is held to be in fault for a collision with another ship, that is on her right side, and has done all that the law requires to keep clear."

Marsden, Law of Collisions, 2d Ed., p. 408.

Thus a steamer was condemned for being on the wrong side of the Hudson River in fog.

The *Vanderbilt*, 6 Wall., 225.

From the fact that the *Ludvig Holberg* passed close to buoy 13, that she then steered on a course south half west, that she grounded on West Bank right after the collision, it is clear that the place of collision was close to the West Bank, in a channel three-fourths of a mile wide.

The bark was also at fault, for having no lookout, no competent officer in charge, for the failure of the pilot to direct the tug, for not following in its wake, and for porting without casting off the towrope.

The mate, who was the only man on deck forward, was attending to the men aloft, and at the very time of action had left the forecastle to let go the topsail buntline without stationing any man in his place (Card, p. 11). Even when he was on the forecastle head, his back was to the bow (*ibid*, p. 11).

The captain was below, and did not come up until the hawser had

parted. Had he been on deck when the towrope was ordered to be let go, it would have been done, and the collision avoided.

The pilot ordered the towrope cast off (Ludden, Larsen, p. 12), and at same time had the bark's wheel hard ported, which threw her to the eastward and across the *Ludvig Holberg's* bows.

No rule is more elementary than the one that if the tow ventures on a course divergent from that of her tug, she must first cast off her towline.

A very similar case is the *Energy*, decided by Dr. Phillimore. The tug was there towing the bark *Lizzie Aisbitt* astern on a 150 feet hawser. The bark came into collision with the bark *Mary*. Dr. Phillimore says:

"The tug and the *Lizzie Aisbitt* were then straightened up the reach. The *Mary* was standing across the river on the port tack. The tug ported and cleared the *Mary;* the *Lizzie Aisbitt* starboarded under the direction of the pilot, and ran into her amidships on the starboard side. *The pilot had previously run to let go the rope which was wound round the starboard bitts; he found no one, he says, to help him in doing this.* The Trinity masters advise me that when the *Mary* was seen it must have been apparent that she was not backing and filling, but was under full sail standing to the north on the port tack, and, of course, with headway upon her. It was an error in judgment on the part of the tug to attempt to tow the *Lizzie Aisbitt* across the bow of the *Mary;* the *Lizzie Aisbitt* would probably have come in collision if she had followed the tug, although the tug herself just succeeded in clearing the *Mary*. The first defense, therefore, set up on behalf of the tug in this cause fails.

I have now to consider the second defense, namely, that the pilot did not give the proper directions to the tug. It was the duty of the pilot, when the tug ported, to let go the tow-rope. The tow-rope on board the tug is attached by a simple slip—an eye over a hook, so fastened that it can be let go immediately. The pilot, according to his own evidence, gave no order at all to the tug, but ran himself to cast the rope off from the starboard bitts around which it was belayed; in doing which he was, as I have said, unassisted. The tug, if the proper order had been given to her, could have cast off the rope in a much shorter time. And if that order had been given, in all probability the bark would have gone under the stern of the *Mary* and the collision would not have taken place. If the tug had disobeyed the order of the pilot he would have been guilty of a breach of contract and have been responsible for the collision. As it was, the tug committed an error, *which was not corrected as it ought* to have been by the order from the pilot." L. R. 3 Ad. & Eccl., 48, 55.

Third.—It was actually made a ground of exception that the Circuit Judge alluded in his opinion to the fact that on the issue of fog some witnesses were examined in the presence of the District Judge (27th and 30th Exceptions).

This is but applying the principle, not peculiar to the Second Circuit, but generally recognized in all maritime appeals, that the judge, in the first instance, who observes the appearance, demeanor and candor of the witnesses called before him, can better test and decide upon the weight and credibility of their testimony than a court which simply reviews the case from the appeal record.

Decisions of other Circuits declaring the same general consideration against disturbing the findings of fact made by the judge who had opportunity to see the witnesses are :

The *Albany*, 48 F. R., 565, 1st Circuit.
The *Warrior*, 7 U. S. Appeals, 559, 9th Circuit.

Perhaps no stronger reason for this obvious rule has ever been given than in the *Julia*, 14 Moore, P. C., p. 210, and the *Constitution*, 2 Moore, P. C. N. S., 453.

In case of the *Alice* and the *Princess Alice*, L. R., 2 P. C., 245, on appeal from an admiralty decree, Lord Justice Wood said :

"In the course of the argument on this case one of their Lordships has cited the decision in the case of *The Julia*, which laid down in very clear and precise terms the course that this Committee thinks it right to take with reference to appeals from decrees of the Court below upon matters which are entirely matters of fact. If this Board finds that in the Court below there was clear and distinctive evidence on the one side and, possibly, evidence which the appellant might think to be as clear and distinct on the other side, nevertheless, if the Judge in the Court below, in his discretion, having the opportunity of seeing the witnesses and observing their demeanor, has come, on the balance of testimony, to a clear and decisive conclusion, those who undertake to reverse that conclusion, on the ground that the Judge has errred in giving credence to the one class of witnesses rather than to the other, undertake, as expressed in the case of "The Julia," an almost impossible task. This Committee has no opportunity of seeing the witnesses, of considering in what respect credence should be given to one class rather than the other, from the mode in which their evidence has been given; and it would have to perform a

duty of a most painful character if it were not merely to reverse the decision of the Judge below with reference to the finding that he has come to adverse to the appellant, but had, in such a state of circumstances to do that which would be a necessary corollary from such a step, viz., to give a deliberate judgment in favor of the respondent, without the same means of ascertaining the real truth as was possessed by the Court below."

The foregoing authorities accord with the law often declared by this Court.

"It is enough to say that we find ample testimony to support the decision, if believed, and that we again repeat what we have often before decided, that in such cases parties should not appeal to this Court with any expectation that we will reverse the decision of the Courts below because counsel can find in the mass of conflicting testimony enough to support the allegations of the appellant if the testimony of the appellee be entirely disregarded, or by attacking the character of his witnesses when the truth of their testimony has been sustained by the opinions of both of the Courts below."

Newell v. *Norton*, 3 Wall., 267.
Also the *S. B. Wheeler*, 20 Wall., 386.
The *Richmond*, 103 U. S., 540.

In a very recent admiralty appeal to the House of Lords which involved questions of fact, Lord Watson said:

"In my opinion, it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous. And the the principle appears to me to be specially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability." *The P. Caland*, Ap. Cases, 1893, p. 216.

Fourth.—The finding of the courts below that the *Ludvig Holberg* was running dead slow, and had been for four or five minutes before the collision, is abundantly sustained.

She was seen and passed by the *St. Johns* running close shut down more than five minutes before the collision (Warren, p. 39). This evi-

dence of a disinterested observer is the best confirmation of her own officers.

Her engines are proven to have been set "slow," making from twenty to twenty-five revolutions a minute (Berg, p. 32; Eide, p. 32). The pitch of the propeller is 14 feet 2 inches (Berg, p. 32). Making no allowance for the *slip*, *i. e.*, the loss of efficiency of the propeller by the velocity imparted to the water driving it astern—the speed, computed from the above mechanical *data*, is as follows:

Taking 25 revolutions a minute, would be 1,500 revolutions an hour; 14 feet 2 inches multiplied by 1,500 gives 21,250 feet, which at 6,072 feet a knot is equal to 3.49 knots, her speed for an hour. At such slow speed, there is scarcely any perceptible slip—as the slip decreases with the number of revolutions*—and hence no deduction for slip is made in this calculation.

The testimony of at least six witnesses proves the telegraph to have been set slow to the engineer for several minutes before sighting or hearing the tug.

The experienced officers and the pilot of the *Holberg* who looked over the steamer's side and judged her speed by observing the slow motion of the water passing astern, also made a similar estimate.

Johnson, 2 or 3 knots, p. 26.
Busch, about 3 knots, p. 35.
Mapes, pilot, about 3 miles, p. 42.

This evidence of master, pilot and engineers corroborated by an outside witness, whose disinterestedness and competence is unquestioned, has been accepted as true by both courts below. It certainly should be conclusive in an Appellate Court.

See the *Johns Hopkins*, 13 F. R., 185.

In both the courts below, libellant's counsel has sought to attack this proof by labored figuring on time and distance. The distance from the New York pier from which the *Holberg* started is about 9½ nautical miles. The time of starting, at the latest, was 3.15 P. M.

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* "As the slip is *less* when the vessel is running at slow speed than when running at high speed," etc., per Brown, J. in the *Martello*, 34 Fed. Rep., 71, 73.

The time of the collision was about 4.30, according to the tugboat, and about 4.26 by the evidence from the *Holberg*, which the Court has accepted.

A glance at the chart shows that a vessel leaving the East River by the usual route, crosses a line nearly east and west from Bedloe's Island (where the Statue of Liberty is), to Governor's Island, with the old circular Castle William at the western end. On the usual course from Pier 15 East River to abreast of Castle William, and to the line across to Bedloe's Island the distance is 1¼ miles. Allowing for slowing near the two ferries, the *Ludvig Holberg* would readily run to this point in ten or eleven minutes crossing the line from Bedloe's Island to Fort William at 3:25 or 3:26.

The finding of the Circuit Judge that "she was off Bedloe's Island between 3:27 and 3:32, is not only according to all probability, but received a curious and unexpected confirmation through a witness called by libellant who happened to see the *Holberg* in that very place. Capt. Hulphers, master of the *Wyanoke*, left his pier (26 North River), and noted his time at 3:27 (p. 13), and saw the *Holberg* about that time. He said, "when I first saw this steamer, I was about off our pier, and she was about off Castle William." The logbook of the *Wyanoke* also shows that the time of leaving the pier was noted as 3:27 (p. 15), which the master confirms (p. 13). Allowing for the natural variations of clocks kept on different vessels, the finding "between 3:27 and 3:32" is the most favorable for libellant of which this evidence would admit.

While the counsel naturally preferred the product of his own calculation, and in time became impressed with the verity of the results of his figuring, he can hardly urge an exception taken to the judicial finding based on testimony of libellant's witness instead of conjectures of counsel, however tenaciously he may cling to them after they have been completely disproved.

Although no observer ashore noted the time when the *Holberg* passed out between the forts at the Narrows, libellant's counsel presented to the Circuit Judge a request that he make a finding on this point, necessarily a matter of dealing with probabilities of speed, currents, tides, courses, and not in the nature of things admitting of a precise determination.

In the original findings served, libellant's counsel requested the

Court to find that this time was 4.02, but subsequently he set his time ahead to 4.05, and printed new proposed findings, evidently regarding it essential to the argument of subsequent speed to put back the time of arriving in the Narrows enough to require full speed to get to buoy 11 by 4.26, the alleged time of the collision. As there is no doubt as to the distance to the Narrows from the line off Bedloe's Island, which is 5⅛ miles, and the *Holberg* was then making about 9¼ knots through the water, with one knot ebb current, making 10¼ knots over the ground, it would only take her 30½ minutes to the Forts, and, therefore, accepting Captain Hulphers' testimony, she would arrive at the Forts at 3.57 or 3.58.

By these admitted factors of speed and distance the learned Court could only find in response to libellant's request that "it was nearly four o'clock when she reached Fort Lafayette." (Sixth finding, p. 51.)

It is needless to pursue these calculations further, as it already appears that the basis of the appellant's computation has always been some assumed retardation of the *Holberg before* reaching the Forts at the Narrows, in order thereby to deduce a necessity for greater speed than she has stated, and was actually observed to be making, when overtaken and passed by another steamer shortly before the collision.

Failing in all these efforts, counsel argued in the court below, that the place of collision was as far from buoy 11 as the wreck now lies, and has since excepted to the finding as to the place of collision. Both courts have found that the collision occurred near buoy 11, and that the bark was towed for a considerable distance before she reached the spot where finally grounded.

The testimony on the issue of the place of collision and the distance that the bark was towed after she had been collided with, fully sustains the concurrent findings of both courts.

McDevitt, the master of the tug *Leonard Richards*, says that he towed the bark one-half to three-quarters of a mile (p. 23), and Donovan says they towed about ten minutes before the bark took the ground (p. 10). Card, mate of the bark, said the *Quickstep* was towed between an eighth and a quarter of a mile till she was aground (p. 11). He also says he saw the buoy on the south end of the West Bank a little abaft the beam on the bark's *starboard quarter*, showing that they towed the bark from a point near to that buoy. The conclusion of the

master of the *Holberg* that the collision was three or four ship lengths from buoy 11 is undoubtedly substantially correct (Busch, p. 36).

The learned Circuit Judge rightly refused the request of libellant's counsel to locate the place more definitely than he did in his second finding, that the collision was "a little to the southward and eastward of buoy No. 11" (p. 50).

From the facts that the *Holberg* carried her full steam pressure and the steam did not blow off at the safety valve, an argumentative inference of full speed was attempted to be drawn by the libellant's counsel. If any presumption of fact were to be indulged in to defeat the sworn testimony of slow speed, certainly it is preferable that an expert should be called who can stand cross-examination as to the grounds of such a novel opinion.

As a matter of steam engineering, it is obvious that as high speed exhausts steam, full pressure on the steam gauges indicates that the throttle is set so that steam consumption in the cylinders does not exceed the steam supply from the boilers. Any inference to be drawn is rather for slow speed which has allowed steam to accumulate. The argument from the absence of steam blowing off also proves nothing. As steam blowing off and going to waste indicates an excess of steam made over that used, its absence only proves that on reducing the revolutions, at the same time also the draught was lessened at the furnace dampers—an ordinary precaution of any prudent engineer—from which no inference of high speed can be drawn, but rather the contrary.

Judging the *Holberg* by the entire distance run, going back over an hour before the collision, and subjecting her story to the most critical scrutiny, confirms the testimony given by her witnesses in all essentials. Considering that her officers were foreigners, not acquainted with the precise points about New York, and that the Forts at the Narrows are extensive earth fortifications covering a long shore line, slight discrepancies as to when and where the fog was first met, and the point where the steamer first slowed to half speed, are of trifling importance.

The finding of dead slow speed for five minutes before the collision is in no way affected by this mass of misapplied computation, where counsel first imagines, then figures, and triumphantly claims the result as a demonstration.

Fifth.—The *Ludvig Holberg* was rightly found to have been fully manned (fourth finding, p. 51), and there is no force in the point that any additional wheelsman was required (2d and 36th Exceptions).

No such charge was made in the libel (pp. 2, 3). On the bridge of the *Holberg* were the master and pilot, the latter being in sole charge. When the situation became critical, the master assisted the wheelsman to put the wheel over more rapidly, and there is no suggestion but that the vessel obeyed the pilot's orders promptly, and was handy in her different swings to port and starboard. It is to be borne also in mind that the *Ludvig Holberg* was only 200 feet long, and being light, in ballast, steered with no difficulty.

Sixth.—The *Ludvig Holberg*, already running dead slow, was not bound actually to stop on hearing the first whistle of the tug ahead, followed by another a little more on her starboard bow.

The duty of a steam vessel, hearing a whistle close by, is usually to check her speed. This had already been done by the *Holberg*. Whether then to stop or not depends on the circumstances of the particular case. In a late English appeal, Lord Morris, said :

" But, my Lords, it appears to me that there is nothing magic in waiting for a second whistle rather than acting upon the first whistle, if the first whistle showed sufficient indication, and gave good reason for the *Haswell* for altering her course." The *Vindemora*, App. Cases, 1891, pp. 9, 10.

The situation was cautiously observed. The *Holberg* was provided with an improved repeating telegraph for conveying orders to the engine room, and there was no occasion to stop when the tug's whistle showed her direction to be drawing off to starboard. Suppose, however, that the pilot of the *Holberg* had rung the telegraph to stop; the instant after, when the tug appeared, he would have countermanded that order, before it could be obeyed, by telegraphing " ahead slow," and the probability is that no actual change in the engines or the collision would have occurred. It is submitted that the risk of the collision was never with the tug herself, but with the silent and invisible tow five hundred feet astern, which would not be escaped merely by additional precautions as to the tug.

Seventh.—The *Ludvig Holberg* did all in her power to avert collision.

She had taken all the way off her that would be possible without coming to a standstill, and risking going ashore. As a matter of fact, the current did set the steamship aground, right after the collision. The appearance of the tug closely followed her whistles. On emerging from the fog, the tug blew two blasts to indicate that she was going to the left. The *Ludvig Holberg* answered with two blasts in assent. She rightly starboarded her helm as the blasts imported. The moment the loom of the bark's rigging was seen, the *Holberg* backed, ported and sung out to cast off the hawser.

The tug 100 feet long, the hawser about 500 feet, the bark about 160 feet—together a length of over 750 feet—were diagonally crossing the steamer's bow in fog. The bark put her helm hard-a-port and enclosed the steamer in the angle of her sheer, and by keeping the hawser fast, closed the only avenue of escape left to the *Holberg*. Even then, if the tug had stopped, there was a chance of lessening the collision, but the *Leonard Richards* kept going, heading broad off to the westward, with taut hawser, which forced the steamer's bow against bark's quarter.

No case was ever more carefully examined to extract the facts from a vast amount of contradictory testimony. It is submitted that no commander or pilot on the steamship, however prudent and watchful, could avert a collision, when a tug and tow are met coming astride of the course of the *Holberg* and steadily diverging. The *causa causans* of the collision was this unexpected and alarming divergence of tug and tow at a moment when escape was hopeless.

The decisions of the district and circuit courts were right, and the decree appealed from should be affirmed with costs.

HARRINGTON PUTNAM
Advocate for the Appellees

November 22d, 1894

APPENDIX.

Collision—Length of Tow Rope in Fog.

"HYDASPES" AND "CENTURION," S.S.

Inquiry held 10th, 11th, 12th and 13th August, 1880.

Assessors: W. PARFITT; R. S. CLARKE.

The *Hydaspes* was an iron sailing ship of 2,092 tons net register. She left Gravesend on the 17th of July, 1880, with a crew of 47 hands all told, 40 passengers, and about 2,000 tons of cargo, bound to Melbourne, and in tow of a steamtug called the *Napoleon*. At 2.30 P. M. the same day, Dover Pier bore N. magnetic, distant one to one and three-quarter miles. At 2.45 the Trinity House pilot left her, and the vessel proceeded on her course, steering S. W. by W., and making from six to seven knots an hour. At this time the weather was rather hazy, but vessels could be seen from three to four miles off, the sea was perfectly smooth, the wind very light from the eastward, and the tide the last hour and a half of the westerly current. At 4.20 the weather began to set in thick, upon which orders were given for the tug to be eased, and at 4.30, on its becoming very thick, they were ordered to go "dead slow," the vessel making one and a-half to two knots an hour. From this time the *Napoleon's* steam whistle and the *Hydaspes'* foghorn were kept going alternately. At about 4.50 those on board the tug heard a faint whistle a little on the starboard bow. The vessel, however, kept moving slowly ahead, and soon after another whistle was heard nearer and somewhat broader on the bow. This was followed by a third whistle, and at the same instant a vessel, which afterwards proved to be the *Centurion*, was observed on the tug's starboard quarter, heading apparently about E. by S., and making directly for the *Hydaspes*, upon which the captain of the *Napoleon* at once hailed her to "go astern full speed," telling them that he had a large vessel in tow, and at the same time he hailed the *Hydaspes* to hard-astarboard her helm, as there was a steamer inside of them. They were then hailed from the *Centurion* to cast off the towline, which they immediately did, and the tug then hard-astarboarded her helm.

In the meantime those on board the *Hydaspes* had heard the *Centurion's* whistle, but only faintly, and on being hailed to cast off the towrope and starboard the helm they at once did so, but too late; for almost immediately afterwards the *Centurion* was observed coming

out of the fog and heading directly for them, and she came on and struck the *Hydaspes* just abaft the fore rigging on the starboard side, cutting her down below the water's edge. The *Centurion* at first rebounded, but on her engines being put on ahead easy she was again brought alongside, and all the crew and passengers clambered or were hauled up on board the *Centurion*, except the master, chief mate, and pilot of the *Hydaspes*, who remained by their vessel, and then got into the tugboat, which had in the meantime come up on their port quarter; and very shortly afterwards the *Hydaspes* sank with everything on board. The tug then went alongside the *Centurion*, took off the passengers and the remainder of the crew, and landed them the same evening at Dover.

The story told by the *Centurion* was as follows: She was an iron screw steamship of 1,845 tons gross and 1,178 tons net register. She left Almeria in Spain, on the 10th of July, 1880, bound to the port of London, having a crew of 27 hands all told, and a full cargo. In the afternoon of the 17th she had arrived at the E. of Dungeness Point, and on sighting the pilot cutter she made towards her, upon which the pilot cutter lowered her boat and sent a pilot to take charge of her. At 4.40 P. M., the vessel at the time being from half a mile to three-quarters of a mile from the Newcombe Buoy, which bore from them about N. W., finding the ship's head about N. E. by E., the pilot ordered the helm to be ported, and laid her on an E. N. E. course, to make Dover Pier. At this time the weather was hazy, and accordingly the engines were ordered to go half-speed. Five minutes afterwards they entered a thick bank of fog, when the pilot ordered the engines to be slowed. After about five minutes a faint whistle was heard slightly on the port bow, upon which the pilot ordered the helm of the *Centurion* to be ported. Shortly afterwards another whistle, as well as a foghorn, were heard somewhat louder, but still on the port bow, and thereupon the helm was hard-aported, which brought her head round from E. N. E. to about E. by S. The whistle was then heard for the third time and the foghorn for the second time, and almost at the same instant the look-out man on board the *Centurion* observed the tug *Napoleon* crossing their bows from port to starboard, at a distance of about 50 yards. On his reporting it, the pilot at once ordered the engines to go full speed astern, but too late, for before the vessel, which had been making between two and three knots, could get any stern way she struck the *Hydaspes* just abaft the fore rigging on the starboard side, in the manner already described, cutting her down to the water's edge, and causing her to sink soon afterwards.

There was some question raised as to whether some esparto grass which was carried on the deck of the *Centurion* had in any way obscured the look-out so as to have caused or contributed to the

collision, but the Court were clearly of opinion that it had not, and also that the speed of both vessels was moderate and proper. They also thought that the *Hydaspes* and the *Napoleon* could not have taken any better course just previously to the collision than they did; but that the *Centurion* was to blame in porting her helm as soon as she heard a faint whistle on her port bow, and before she knew in what direction the vessel was approaching her. Had she waited until she heard the second whistle, she would have found that the vessel was drawing ahead of her and passing her to starboard; and the fog horn would have told her that it was probably a ship in tow of a tug, and that it would be dangerous to port her helm and thus run the risk of colliding either with the tug or the ship. As regards the *Hydaspes*, there was one point in which she appeared not to have been navigated with proper care. She had about 75 fathoms of tow-rope out, and there was a distance of something like from 70 to 72 fathoms between the stern of the tug and the stem of the *Hydaspes;* and the weather was so thick that at that distance the tug could not be seen from the *Hydaspes*, nor the *Hydaspes* from the tug. One of the Trinity House pilots gave evidence to the effect that when the weather became so thick that they had to slacken their speed, their practice was to shorten in the tow-rope so as to keep the tug in sight, and thus be in a position to regulate the courses of both vessels. *This the Court considered to be a proper precaution. Had the tow-line been shortened in to 20 fathoms instead of having between 70 and 72 fathoms between the two vessels, this collision might have been avoided. The Court thought that in such thick weather, not only have vessels no right to cover so large a space of water, but that with a shorter tow-rope they would be much more under control.*

Digest, Judgments Board of Trade, p. 219, London, 1880.

Supreme Court

Of the United States.

The F. O. Matthiessen and Wiechers Sugar Refining Co.,

Libellant and Appellant,

vs. No. 136.

The Steamship Ludvig Holberg: Christopher Kars et al.,

Claimants and Appellees.

Reply for Libellant.

GEORGE A. BLACK,
Of Counsel.

Supreme Court of the United States.

THE F. O. MATTHIESSEN and WIECHERS SUGAR REFINING CO.,
Libellant and Appellant,

vs.

THE STEAMSHIP LUDVIG HOLBERG,
CHRISTOPHER KARS *et al.*,
Claimants and Appellees.

No. 136.

REPLY FOR LIBELLANT.

Apparently claimants' counsel does not assent to the **3d** *preliminary observation* printed on p. 12 of my original brief in these words: "*No discussion of the faults of the tug or bark* "*is relevant* **except as demonstration of the free-** "**dom of fault of the Holberg.**" Yet such must be the logical result of the principle that if the Holberg was in *any degree* in fault, the innocent cargo owner is entitled to recover from her, and no amount of fault of the tug or bark will relieve her from the consequences of her own fault. The *old, old* argument of "*tu quoque*" has no application in admiralty, and the effort to befog the question of the Holberg's fault is an insult to the intelligence of this Court.

Comments on Claimants' Diagram

(Page 3 of Clmt.'s brief).

(**1.**) This diagram is stated to be on the scale of 180 ft. to one inch.

As the Holberg was 200 ft. long (4th Finding, p. 51), and the Quickstep 170 ft. long (3d Finding, p. 51), and they are drawn the same length on the diagram, they do not appear to be drawn to any scale.

(**2.**) The 13th Finding (p. 52) states that the Holberg cleared the tug by **about 30 ft.** Claimants' diagram represents the tug as passing the Holberg **77 ft. off.**

(**3.**) If claimants' counsel shall *explain* that that part of the diagram is intended to represent the tug's position when the Holberg was 265 ft. off—and the bark 852 ft. south of the Holberg (and *invisible* to the Holberg), why has he represented the bark as heading N. x E., ½ E. and the tug N. x W.? There is no such evidence.

Ludden (at wheel of Q.) says (p. 12) "*the tug was right ahead*," and the H. nearly ahead, and a very little on the port bow.

Larsen (at wheel of Q.) says (p. 12) the H. was *a quarter* of a point on the Q.'s port bow.

Note. Claimants' diagram makes the H. nearly **two points** on the port bow of the Q.

(**4.**) The 13th and 14th Findings (p. 52) state that the Holberg cleared the tug by about 30 feet, and **then,** for the first time, the "Holberg became aware of the presence of the Quickstep, which" (*at that time, by reason of the tug's rank sheer*) "was not following directly after the tug, but to starboard of her."

The diagram takes no heed of this finding. It places the H. 300 feet north of the Q. when the H. sees the Q., and the tug **227** feet away to west of the H. *instead of 30 feet off.*

Wood (pilot of the Q.) says (p. 19) that the tug was *just clear* of the Holberg's bow, and the H. was about 200 feet away, ahead of the Q.

The hawser lead over the Q.'s **port** bow (Card, p. 11, Donovan, p. 10), and this would give her the appearance of heading to starboard of the tug. Wood, pilot of the Q., said (p. 20): "Of "course, we have the towboat on one bow or the other a little, "*whichever the hawser is on.*"

Comments on Claimants' Brief.

Page 2. The claimants' counsel speaks of the taut hawser and says: "The tug had been opened full speed" (p. 2).

McDevitt (captain of tug) says (p. 22): "After blowing that "last one whistle *I slowed the tug down*" * * When we "*slowed* down at that time I don't suppose our speed was over "a mile an hour. We might have been going three."

Of course, when the tug took her **rank sheer** across the Holberg's bows, and cleared her by only 30 feet, the Holberg must have been within 30 feet of the tug, and the rank sheer brought the tug *almost* at right angles with the course of the H., and the hawser at the stern of the tug could not have been more than 30 feet away from the H.'s bow, a space she would pass over in $\frac{3}{90}$ of a minute (*i. e. 950 feet in one minute equals 15 feet in one second*) or about 2 seconds, and, catching the hawser on her bow would tauten it and snap it like a thread.

Page 4. Claimants' counsel calls attention to the fact that the decree of the Circuit Court for $404.63 costs (p. 59) was collected by claimants and their satisfaction piece filed (68). The decree (p. 59) directed the Holland Trust Co. to pay these costs *unless stayed on appeal.* As that Trust Co. held the money on deposit and as libellant did not stay the collection, the claimants collected their costs, of course, and, of course, filed a satisfaction piece, *and that is all there is to that;* except that **restitution should be ordered.**

Page 4. The claimants' counsel states that the libellant "*under the form of a bill of exceptions has sought to try the* "*issues anew upon the facts.*"

If this is intended as a suggestion that the libellant has sought to do an *improper* thing, the insinuation is unfounded. This Court has too recently decided that the finding of material facts against the evidence, or without evidence, or the refusal to find,

when established by evidence, raises a question of law for its determination, to render it necessary to again argue that proposition.

The City of New York, 147 U. S., 77: "If the Court below neglects or refuses to make a finding one way or the other "as to the existence of a material fact which has been established by uncontradicted evidence, or if it finds such a fact "when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in "that particular. In the one case the refusal to find would be "equivalent to finding that the fact was immaterial, and in the "other that there was some evidence to prove what is found, "when in truth there was none. **Both of these are questions of law and proper subjects for an appellate Court.**"

Page 5. Claimants' counsel repeats his insinuation, saying: "*Both the Courts below having found * * that the L. H. "for several minutes before sighting the tug was going dead "slow and giving proper signals,* **the attempt is made** *to "reopen this question of fact, upon this appeal to this "Court.*"

Unless libellant has done something unlawful it is entitled to an impartial and unprejudiced hearing in this court, and if it *can* show that both the Courts below made findings against the conclusive evidence, or made findings without evidence to support them, or refused material findings of facts proved by uncontradicted evidence, or **if the Circuit Court adopted an erroneous method** in *its trial* of this **ADMIRALTY APPEAL,** it is clearly in its right.

Page 6. Claimants' counsel states the *broad* proposition that *questions* of fact are not reviewable in the Supreme Court. If this means that this Court is not called upon to *weigh* evidence, it is correct, but if it means that an examination of the evidence must not be made to see if a finding is without evidence, or against the evidence, it is contrary to the decision in the **City of New York,** 147 U. S., 77, which the counsel cites.

Page 6. Claimants' counsel states the law of France. The information is interesting but irrelevant, *unless it is shown*

to govern the review **by this Court** of an Admiralty Appeal from the Circuit Court of the United States.

Page 6. Claimants' counsel states that the finding that the Holberg was slowed down to four knots is "*confirmed by* "*the master of the Sandy Hook steamer St. Johns, which* "**overtook** *and passed the Ludvig Holberg,* **ALTHOUGH** "**the St. Johns, at the time, was runniug not to** "**exceed five knots.**"

The "*although*" in the above extract contains a world of *indirect* misstatement. Interpreted broadly it conveys the assertion that, "*In spite of the fact that the speed of the St.* "*Johns,* **at the time,** *was only five knots, she overtook the* "*Holberg.*"

Did claimants' counsel design that this Court should so understand it? If so, it is necessary to correct the statement, for Capt. Warren, of the St. Johns, testified (p 39) that he had been running full speed until he heard a whistle directly ahead, and *then* he slowed "*right down as quick as he could shut her off*" and (p. 40), that he was slowed down "*not to exceed a minute.*"

Page 7. Claimants' counsel has detailed at length all the sins of the bark and tug and all the virtues of the Holberg—and, as to the latter, has followed the poet's advice:

> "Be to her virtues very kind;
> "Be to her faults a little blind."

If the Holberg can escape the consequences of her own faults by ignoring them, and, by enlarging on those of the bark and tug, induce this Court to overlook her own, she will have much to thank her counsel for.

As to the **City of Alexandria,** 31 F. R., 427, and the **Peshtigo,** 25 F. R., 488, cited on page 8, both were badly decided and they have been overruled by the Circuit Court of Appeals for the 2d Circuit in the *City of New York,* 49 F. R., 958, where the Court says: "what signals should they have "given from the boats or barges? Should it have been by a "mechanical fog-horn or a bell. The one would have indicated "the presence of a sailing vessel under way and the other of a "steamship or sailing ship not under way. *If either of such*

"*signals had been given, and the collision had taken place, it* "*could have been very persuasively urged that the steamboat* "*was misled thereby.*"

The Parthian 55 F R 426

Page 7. Claimants' counsel contends that towing with a hawser of 80 fathoms was a fault of the bark.

(1.) *No such finding was made by the Circuit Court!*

(2.) *No evidence to that effect was given!*

The report of the *English Board of Trade* is quoted at page 21 of claimants' brief, and, by it, it appears that **ONE** pilot from the Trinity House testified to a practice, on which that respectable, but *non-judicial*, body made its finding.

Will this Court accept it as *evidence?*

Page 9. The claimants' counsel invokes the *International Regulations* (Ch. 354, 1885, 23 St. at L. p., 438) but overlooks the exception in § **2** (p. 442) as follows:

"That all laws and parts of laws inconsistent with the fore "going 'Revised International Rules and Regulations' for the "navigation of all public and private vessels of the United States "*upon the high seas and all coast waters* of the United States, "are hereby repealed **except** as to the navigation of such "vessels within the **harbors,** lakes and inland waters of the "United States!"

Is not the "outer bay of New York" (claimants' brief, p. 1,) a *harbor?*

Judge Addison Brown in the **Aurania,** 29 F. R., 102, considered the above "exception" and held that *inside the outer bar was within the harbor*, and pointed out the inconveniences of the two acts (*i. e.* R. S. and Act of 1885) and suggested further legislation. (See The Victory, 63 F. R., 636.)

But the 2d Finding (p. 50) says the Quickstep was proceeding up **"in about the middle of the main ship channel"** and if it was a fault for her to be there, it was equally a fault for the Holberg, which had the tug on her *starboard* bow (10th Fdg., p. 52) and was therefore either crossing the channel or *more* to port (*i. e.*, eastward, and consequently on the *wrong side*), of the mid-channel, while the tug was about in mid-channel.

Pages 9 and 10. Claimants' counsel says the bark was in fault for not casting off the hawser which the pilot ordered to

be cast off. But the counsel omits to state that Ludden, who testified that the order was given by the pilot, added (p. 12), "*But the steamer parted it* **as soon** *as the order was given*," and McDevitt, Capt. of the tug, said (p. 22), "*We tried to cast* "*the hawser off before she struck it.* * * *It was not success-* "*ful* **because it was done too quick. Before they "had got it cast off the bitts she had it cut in "two.**"

Claimants' criticism is well answered by the doggerel of the *Humane* Donkey Driver:

"I'd give him oats and I'd give him hay,
"*But I wouldn't give him* **time** *for to eat 'em.*"

Claimants' counsel cites on p. 10 the (Lizzie Aisbitt). Note that in that case it is stated: "*The tow rope on board the* **tug** "*is attached by simple slip and eye over a hook, so fastened* "*that it can be let go immediately.*"

On board the (Lizzie Aisbitt) the tow rope was "*belayed* "*around the starboard bitts.*"

Page 11. Claimants' counsel states: "It was **actually** "made a ground of exception that the Circuit Judge alluded in "his opinion to the fact, that *on the issue of fog* some witnesses "were examined in the presence of the District Judge."

Lacombe, *J.* said, p. 66, "*Some* of the witnesses who testified "on this branch of the case were examined before the District "Judge. His decision," (*i. e.*, his *whole* decision) **therefore,** "is affirmed."

And he refused (p. 54) to make the new finding (p. 54, 20th) to the effect "that some of the witnesses who testified as to the "fog in the District Court, were examined before the District "Judge, and that it is to be assumed *as matter of law* that the "effect which the appearance of such witnesses produces on "the District Court *is a fact*, proper to be considered by the "Circuit Judge in reaching a conclusion—or some similar con-"clusion of law which would state the *legal effect* intended to "be given by the Court to the fact that *some* witnesses were "so examined before the District Judge."

(Libellant excepted to the refusal.—27th Exception, p. 57.)

It is a matter of gratification to libellant's counsel that the only answer claimants' counsel can make to the argument of libel-

lant's original brief (pp. 72 to 83) is to state that in two other circuits, one Circuit Judge (Colt J., The Albany, 48 F. R., 565), and one Circuit Court of Appeals (The Warrior, 54 F. R., 537) have *blindly* followed the erroneous decisions of the 2d Circuit.

Whatever may be the course of procedure in the English courts in respect to the *right to produce witnesses* before the Appellate Court on the trial of an *admiralty* appeal it can furnish *no aid* to this Court in determining the *question of law*, now presented to it, and which has arisen from the refusal of the Circuit Court to **obey** the repeated decisions of this Court cited by me.

But it may be well to note that in the very recent case of the **P. Calend., 1893, Ap. C., 216** (cited on p. 12 of claimants' brief) that Court did not declare the *invulnerability* of the facts found by the lower courts, but asserted the right to disregard them if "they can arrive at—I will not say a certainty * * * **"but a tolerably clear conviction that these "findings are erroneous."**

Page 12. Claimants' counsel in his Fourth Point says: "She (the Holberg) was seen and passed by the St. Johns *more "than five minutes* before the collision."

This so nearly agrees with my argument, that but for the indefinite "*more than*" I should say I had convinced the claimants' counsel. If I may assume that "more than 5 minutes" means **not more** "than 6 minutes," we absolutely agree that the St. Johns passed the Holberg about 4.20 P. M. and the Holberg was in collision about 4.26 P. M.

And as the Holberg was passed by the St. Johns "a *little below* buoy 13" and was in collision (as found by the 2d Fdg.) *a little to the Southward* of buoy No 11; and as the distance between those buoys is 4,500 ft. (9th Fdg.) she *could not run* **that distance** in 6 minutes, at a less speed than 750 feet (*i. e.*, $750 \times 6 = 4{,}500$) in one minute, and 750 ft. a minute is $7\frac{1}{2}$ k. an hour, and **she would have to keep up that speed ALL THE WAY.**

Note.—Judge Lacombe found that the Holberg ran 4,500 ft. to the collision at 4 k. an hour over the ground—and this is the distance from Buoy No. 13 to No. 11, or from a *little* below No. 13 to a *little* below No. 11.

But I have shown that the collision took place nearly ¼ of a mile below No. 11.

If the distance was only 4,500 ft. the speed of the Holberg was nearly double what Judge Lacombe gave her.

Page 13. Claimants' counsel makes a computation of the **possible slow speed** of the Holberg and takes **25** turns of her screw per minute as the basis.

But the finding (5th Fdg.) is "she made at slow speed **from 20 to 25** revolutions per minute" and if she was running in the **dense** fog five turns a minute above 20 turns (*having the ability to go at 20*), she committed a grave fault.

The Martello, 34 F. R., 74. A. Brown, J. "The "engineer indeed, says that the Martello had only steer- "age-way, but he was not the proper officer to testify to such "a fact, and from his own testimony it appears **that the "engine could have been run more slowly than "24 revolutions.**

"If the fog was so thick that the Willey could not be seen "more than from *250* to 700 feet, as most of the Martello's "witnesses testify, **her speed was not moderate** within "the decisions, **BECAUSE SHE COULD GO SLOWER,** "and it was impossible, *with that speed* to avoid any approach- "ing vessel, within that distance." See page 16 of my original "brief and note.†

Page 13. Claimants' counsel defines "slip" as the "loss "of efficiency of the propeller *by the velocity imparted to the "water driving it astern.*"

Of course the last "*it*" refers to the water, and the sentence is read, "by the velocity imparted to the water, driving *it* astern," and thus read it comes near accuracy.

To illustrate. If I turn a screw into a mass of solid matter, for each complete turn, the screw advances the pitch of the thread—say one foot. If, however, the solid matter *has motion of its own*, and **recedes** one inch while the screw makes its one turn, instead of advancing *through space* 12 inches, it has only *advanced* 11 inches (*e. g.*, in the case of a vessel moving *over the ground*), and if the water is "driven astern" by reason of its fluidity, the distance it is so driven, while the screw makes its one turn, is the "slip."

The suggestion that "*there is scarcely any perceptible slip*" at slow speed, made by claimants' counsel, is contrary to the well known physical property of resistance in water, which *increases* as the cube of the *velocity*, and consequently the slip at high speeds should be *less than at low*.

See Note H. of Judge Addison Brown to the **Normandie**, 43 F. R., 160.

In White's Naval Architecture, p. 548, the author says: "That since at *moderate* speeds the resistance of a ship varies "as the square of her speed, the same propeller should, *within* "*these limits of speed*, drive the ship with the *same percentage* "*of slip*, but that **outside those limits** of speed the "percentage should **increase.**"

This is Judge Brown's only authority for the statement in the Martello, 34 F. R., 73, printed as a foot-note to p. 13 of claimants' brief. But *slow* is as much outside as *fast*.

Ganot's Physics, § 48, p. 33:

"The resistance increases with the velocity of the moving "body, and for *moderate velocities* is proportional to the square. "For supposing the velocities of a body made twice as great, "*it must displace twice as much matter* and must also impart "to the displaced particles twice the velocity.

"For *high velocities*, the resistance in a medium increases "in a more rapid ratio than that of the square, for some of the "medium is carried along with the moving body, and this, by "its *friction* against the other portions of the medium, causes "a loss of velocity.

"It is this resistance which so greatly increases the difficulty "and cost of attaining very high speed in steam vessels."

"Modern Steam Practice," by John G. Winton, Engineer. Gebbie & Co., Phila., 1883.

Vol. 1, p. 478: "Thus, a point on the thread when working "in a nut with a corresponding thread, will move forward the "extent of the pitch in a single revolution. In this way the "screw propeller may be termed an endless screw, working "into an endless nut—the ocean. Thus, supposing the pitch of "the screw is 20 feet, and the distance the vessel has to go "forward 4,000 feet, the screw propeller would require to make "200 revolutions to move the vessel that distance. The action "of a corkscrew is similar to the action of the screw propeller;

" with each revolution of the screw a certain progressive move-
" ment is made through the cork, due, of course, to the pitch or
" spiral of the screw : *but as the screw propeller moves in a*
" *yielding fluid, sometimes the action ceases by the thread of*
" *the watery nut becoming, as it were, broken for a time, and*
" *the propeller revolves without imparting any forward motion*
" *to the vessel.* This is termed the **" slip "** of the screw, and
" varies from about 10 to 20 per cent."

A Practical Treatise on Modern Screw Propulsion—by N. P. Burgh. London. Wm. Clowes & Sons, Limited. 13 Charing Cross, S. W. 1881. p. 241. " Now it
" must be distinctly understood that the action of the *aft* sur-
" face of the blade, when turning around, is *to press against the*
" *water it is in contact with. And if that water gives way, or*
" *is impelled backward by the blade, the result is a loss of re-*
" *sistance, which effect is the cause of* **" positive slip "** *of*
" *the screw propeller* under all circumstances; inasmuch that
" if the screw worked in a *solid* there would be no slip, but as
" it works in a *liquid*, and that liquid is movable, the *backward*
" *motion of the water* reduces its resistant effect proportion-
" ately to the speed of the motion.

" From these conclusions is given the following axiom : the
" power requisite to push or throw any volume at a certain
" speed and distance, is power expended without recovery.
" The principle of this axiom is constant, and refers to what-
" ever the propeller performs, but most particular *to the pro-*
" *pulsion* of the ship forward *and the impelling or throwing*
" *the water backward*, which are two operations at the same
" time in opposite directions.

" It is equally obvious that the power expended to throw the
" water back, must be deducted from the propulsive effect of
" the screw ; for example : suppose a ship is at her moorings or
" in dock, and the propeller is set in motion for ahead, *the*
" *water will be driven back furiously* and the mooring chains
" become taut ; but if the ship were released from her moorings,
" then the power would be reversed in its direction of expendi-
" ture, and what was impelling the water backwards, would then
" impel the ship forwards, and thus the water would become the
" resistant instead of the ship. We have therefore in the mat-
" ter of screw propulsion two resistants, being the water and the
" ship, and either the one or the other must be the stronger ; of

"course the ship is the latter when she is at her moorings; and "the reverse of course takes place when she is in motion; *there-* "*fore the* **faster** *she goes the* **greater** *is the resistant* "*effect of the water* behind the propeller in proportion to that "in front of the hull." * * *

P. 244. **"Slip of the screw propeller."** "The "*true slip* of a screw propeller may be represented *by the* "*velocity of the current of water pushed back by the screw* "*blades.*"

Id. p. 25: "The Malaca, Liverpool, Aurora, Ajax and *many* "*other ships* also showed, on trial, *that an increased speed of* "*propeller gave* **less** *slip*—that is, the slip with full power "of engines **is less than when using only half** "**power.**"

Id. p. 266: "To ascertain the actual pitch required at a given "speed of the screw to produce a given speed of the ship, the "rule will be as follows:

"Pitch of screw in feet = $\frac{\text{Actual speed of ship in feet per hour.}}{\text{Number of revolutions of screw per hour} \times \text{by .9 to .75.}}$

"This rule allows a **slip** or loss of speed of 10 to 25 per cent., "20 per cent. being the average for warships."

Page 14. Claimants' counsel says: from Pier 15, E. R., to Bedloe's Island is 1¼ miles, and "*and allowing for slowing* "*near the two ferries, the Ludvig Holberg would readily run* "*to this point in 10 or 11 minutes.*"

Would she?

One and one-quarter knots is **7,600 feet,** and she would have to go 760 feet in one minute (or 7½ knots an hour) **all the time,** to do it in 10 minutes. Half speed of the Holberg was 6½ to 7 knots (5th Fdg., p. 51) and *slow* about 3½ (*id.*) and "*she ran* **slow** *out of the East River*" (5th Fdg., p. 51).

Claimants' Counsel says (p. 14 of his brief):

"The finding of the Circuit Judge that she was off Bedloe's "Island between 3:27 and 3:32 * * receives a curious and "unexpected confirmation through a witness, called by libellant, "who happened to see the Holberg in that very place."

This witness, Capt. **Hulphers,** left Pier 26, N. R., in the Wyanoke, at 3.27 P. M., and first said (p. 13)—"I first noticed "the Holberg *after* she came out of the East River. I was be- "hind her. That was **somewhere about** *my leaving*

"*the pier*, **or a little below** *perhaps*," and at p. 14, "I "was **about** off our pier and she was **about** *off Castle* "*William*," and from this claimants' counsel gets his *confirmation*.

If *about* meant *exactly*, it would be such.

But in his search for comfort and confirmation, claimants' counsel overlooked the *precise* evidence of the log of the Old Dominion (p. 17): "P. M. 3:23 sailed from New York. 3:31 Governor's Island" (*i. e.* **abeam** of Governor's Island, see p. 18, where Mate Cates of the O. D., says "the bearing of an object "passed, at the time I noted passing, was *abeam*") and Capt. Smith of the O. D., says (p. 16): "I saw the Ludvid Holberg "that day. I first saw her in the East River, *just the other* "*side of South Ferry*, **as the Old Dominion was cross-** "**ing the mouth of the river.**"

It is pretty evident that the Holberg was not "off" (in the sense of West of) Castle William when Capt. Smith saw her the "*other side of South Ferry*" between 3:28 and 3:30 P. M. and still a mile and a half east of Bedloe's Island, and more than ¾ of mile to run to get abreast of it.

Page 14. Claimants' Counsel says:

"Although no observer **ashore** noted the time when the "Holberg passed between the Forts at the Narrows, etc."

The counsel is to be commended for the qualification of his statement as to observers, *for without it it would be untrue.*

Did it need that the observer should be *ashore*, in order to qualify him to make an observation, or be believed?

Hulphers, Capt. of the Wyanoke, passed the Holberg *just inside* the Narrows, but his evidence is utterly ignored. Why?

Hulphers says (p. 14): "I was pretty near abreast of Fort "Lafayette when I passed the Holberg—may have been a little "past the Holberg when I was abreast of the fort," and at page 67 of my original brief I show that the Wyanoke passed Fort Lafayette at about 4:04½ P. M.

Page 15. Claimants' Counsel says:

"*Accepting Capt. Hulphers' testimony, she* (the Holberg) "*would arrive at the Forts at 3:57 or 3:58.*"

But as the Wyanoke, with Hulphers on her, arrived at the

forts *before* the Holberg did, the Wyanoke must have got there *before* 3:57 or 3:58, and as she left Pier 26, N. R. at 3:27, she would have 30 minutes in which to run 7½ k. = 43,320 ft., which is 1444 ft. in one minute, or over 14¼ k. an hour, **which would be pretty good going for an eleven knot ship.**

Hulphers says (p. 14): "Our speed through the water is "11¼ knots."

Page 15. Claimants' counsel quotes Card's (mate of Q.) evidence as proof that the collision was about abreast of No. 11 buoy. Card said (p. 11) he saw "the buoy on the south end of the "west bank, a little *abaft the beam* on the bark's **starboard** "side or quarter."

If this referred to the time of the collision, it is *impossible;* for heading northerly as the Q. did, No. 11 would be on her *port* side. It obviously does refer to the time the Quickstep struck on the West Bank in 25 ft. of water, while being towed to the *west*, when No. 11 would be on her starboard side and abaft her beam when she struck, as she lies to the W. of a line drawn south through No. 11.

Page 16. In his desperation, the claimants' counsel **assumes** that the crew of the Holberg did not know where Quarantine Station was, and to excuse them, says "*her officers* "*were foreigners.*"

Was Gideon Mapes, her pilot, a foreigner too?

Claimants' counsel also talks of "*extensive earth fortifica-* "*tions*" at the Narrows.

Is Ft. Lafayette an extensive earth fortification?

Page 16. Claimants' counsel ventilates some novel views on the effect of *lessening* the *draught* on the boilers. Does he mean that the *pressure of steam* would not also be lessened if the draught was lessened? But the pressure remained the same!

Page 18. Claimant's counsel *asserts* that the "current" set the Holberg aground right after the collision."

Of course there is no evidence of this.

She drew 13 ft. aft and 9 ft. forward (4th Fdg., p. 51) and I *assert* she tried to escape recognition by running away, hoping to pass over West Bank with her light draught.

Lastly. Libellant's counsel has in his brief and in this reply used plain words—and called a lie, a lie, and not an "intentional misstatement." He has pointed out the blunders of the judges below and called them blunders, and not "inaccuracies" or "mistakes"—he has commented on the errors of fact, of reason, or of logic they have made (as was his right), and put them before this Court in the most *glaring light* he could; yet when all is said, it must be conceded that if there be severity in what has been said, it is not because it is said by counsel, but because it is **true.**

Nov. 24, 1894.

Respectfully submitted,
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